

REPERTORIUM CANONICUM:
OR, AN ^{59d}
ABRIDGMENT
OF THE
Ecclesiastical Laws
OF THIS
REALM,
Consistent with the
TEMPORAL:
WHEREIN

The most Material Points relating to such *Persons* and *Things*
as come within the Cognizance thereof, are succinctly Treated.

The Third Edition Corrected :

Whereunto is added An APPENDIX.

*Principio Comperto facile est adicere, & Reliquum Cospiare. Tho. Cano. in
Proam. Decret. nu. 3. l. 1.*

By JOHN GODOLPHIN, LL. D.

L O N D O N,

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Wm. North

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ECCLIESIASTICAL LAWS

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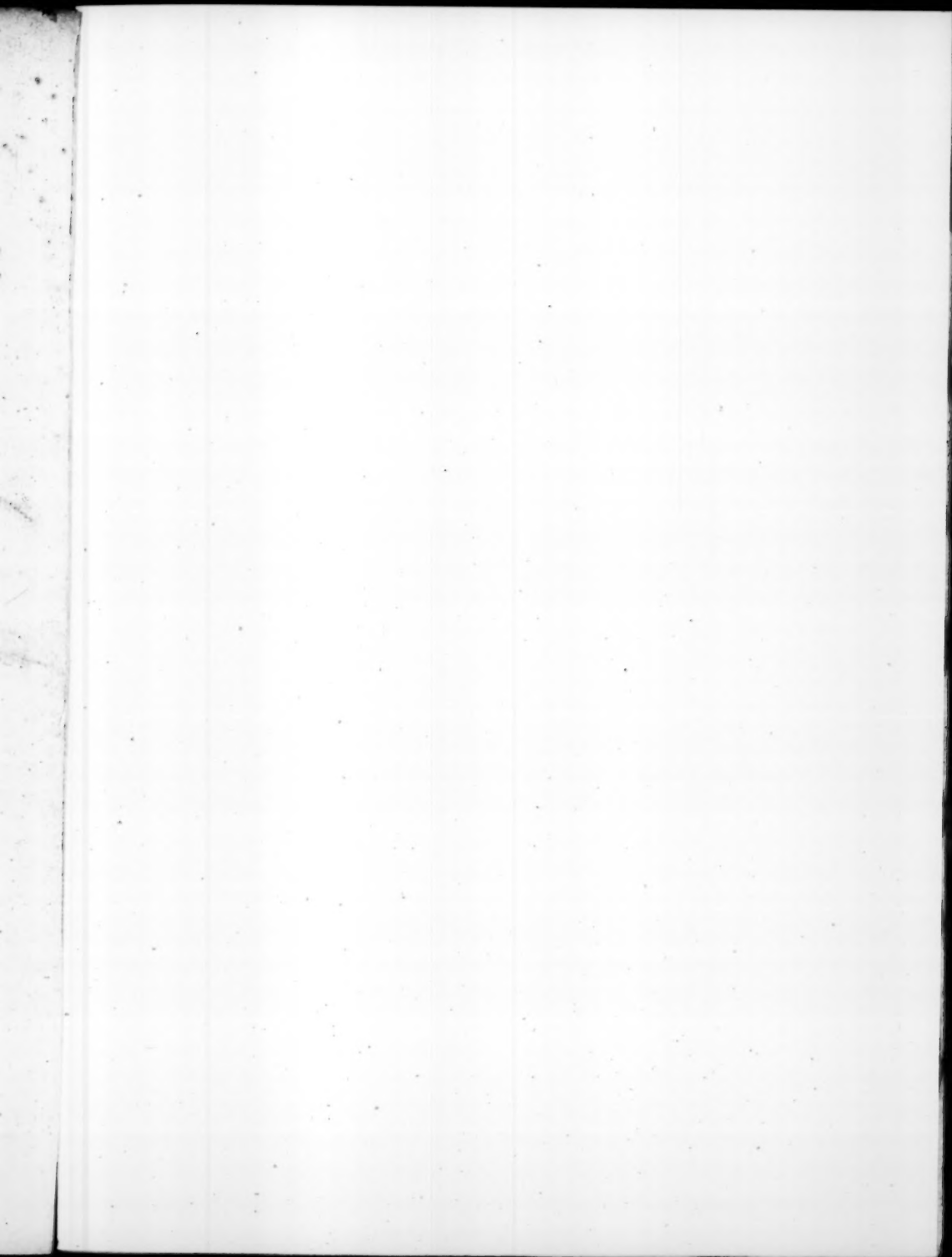
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AN ABRIDGMENT OF THE
ECCLESIASTICAL LAWS.

Guil. Sill, R. P. D.
H E N R. Episc. Lond.
à Sacris Dom.



REPERTORIUM CANNONICUM:

ABRIDGMENT

Eccelesiastical Laws





THE Introduction.



THE Question which King *Henry the Eighth* did once put to both the Universities of this Realm, viz. *An ali-*
quid Authoritatis in hoc Regno Angliæ Pontifici Romano de jure com-
petat, plusquam alii cuicunque Epif-
copo Extero? being resolved in the Negative, and that Resolution ratified in the Convocation *An. 1534.* an Act of Parliament passed about two years after for the extinguishing of that Papal Authority in this Realm. This succeeded so well in consequence of what the Convocation *An. 1530.* had before acknowledged him, viz. *The Supreme Head on Earth of the Church of England,* that that Supremacy was likewise after confirmed by Act of Parliament to him, his Heirs, and Successours. This is that Supremacy here tenderly touch'd at in the first Chapter of the ensuing *Abridgment*, and without which all that follows would be but insignificant and disfigured Cyphers. When King *Henry the Eighth* was thus both Parliamentarily and Synodically invested herewith, although it was with

The King's Supremacy.

all the Privileges and Preheminences incident thereto, yet no more accrued to the Crown thereby, than was legally inherent in it before; yet in regard of the Usurpations, that in divers Kings Reigns had successively invaded the Rights of the Crown in that most splendid Jewel thereof, another Convocation in *An. 1532.* (to give the King as it were, Livery and Seisin of the said Supremacy) promised him *in verbo Sacerdotis*, That they would not from thenceforth Assemble in any Convocation or Synod without his Majesties Writ, nor make any Canons or Constitutions without his License and consent, nor execute the same untill they were Ratified under the Great Seal of *England.* All which was done without the least diminution of any Archiepiscopal or Episcopal Power or Privileges in the free exercise of that Ecclesiastical Jurisdiction which they anciently enjoyed. The whole of this design being onely to eject the *Roman Pontifex*, and annull his Usurpation in a matter of that weighty consequence, to which the Crown was so undoubtedly entituled: And this onely in a way consonant to that Allegiance, which every Subject without distinction owes to his lawfull Sovereign in all matters, as well Ecclesiastical as Civil, within his Majesties Realms and Dominions; whereby the Clergy as well as *Laiety*, being all Subjects alike, might be reduced not onely to their Primitive Obedience unto, but also to their Dependence on their own Sovereign in preference to any Foreign Potentate whatever.—*That the Supreme Civil Power is also Supreme Governour over all Persons, and in all Causes Ecclesiastical, is a Rule* (says the Learned Bishop Taylor) *of such great necessity for the conduct of Conscience, as that it is the measure of determining all Questions concerning the Sanction of Obedience to all Ecclesiastical Laws, the duty of Bishops and Priests to their Princes, the necessity of their paying Tribute, and discharging the burthens, and relieving the necessities of the Republic. It was never known* (say the same Authour) *in the Primitive Church, that ever any Ecclesiastical Law did oblige the Catholick Church; unless*
the

Vid. Heyl.
Cyp. Angl.
p. 1.

In his Cases
of Conscience,
lib. 3. ch. 3.
fol. 544.

Lib. 3. cap. 4.
fol. 500. nu 4.

the Secular Prince did establish it. The *Nicene* Canons became Laws by the Rescript of the Emperour *Constantine*, says *Sozomen*. When the Council of *Constantinople* was finished, the Fathers wrote to the Emperour *Theodosius*, and petitioned, *Ut Edicto Pietatis tuæ confirmetur Synodi sententia*. The confirmation of the Canon and Decrees of the great Council at *Ephesus* by the Emperour, is to be seen at the end of the Acts of the Synod. And *Marcian* the Emperour wrote to *Palladius* his Prefect a Letter, in which he testifies, that he made the Decrees of the Council of *Chalcedon* to become Laws, *Ea quæ de Christiana fide à Sacerdotibus qui Chalcedone convenerunt, per nostra Præcepta Statuta sunt, &c.* Thus also the Fathers of the Fifth General Synod petitioned *Justinian* to confirm and establish their Canons into a Law. The same Prince also published a *Novel*, in which he commands *Vim Legum obtinere Ecclesiasticos Canones à quatuor Synodis*, *Nicena Constantinopolitana, prima, Ephesina prima & Chalcedonenſi expositos & confirmatos*. Vid. Concil. *Tolet*. All which confirms it for a Truth, that even in the Primitive Church the Supremacy in matters Ecclesiastical was in the Supreme Secular Prince.

Touching *Archbishops*, our *Malmesbury* confesses, that in the Ancienter times of the *Britains* it was unknown where the Archbishoprick was: At the Council of *Arles*, *An. 314*. *Silvester* the Pope is but plain Bishop, as appears by the Nomenclature of those that were at that Council. The High Title of *Archbishop* was for a long time in use in the Eastern Church, before it came into the West (a). For whereas our *Beda* tells us, That *Augustine* was Ordained Archbishop of the *English Nation* by *Etherius* Archbishop of *Arles* aforesaid, he therein follows the mode of speaking current in his own times: for *Gregory* the then Pope, in his several Letters written to them, affords neither of them that Title; no, not when he bestows the *Pall* upon *Augustine*, and gives him the precedency and priority in respect of *York*, and all other Bishops of *Britain* (b). Yet the incomparable Bishop

*Archbishops,
and Bishops.*

(a) *Spelm. in
Archæologo.*

(b) *Bed. Eccl.
Hist. l. i. c. 27.*

Bishop *Usher* affirms, that they did not quite deny Archbishops among the Old *Britains*, for he proves they had such ;) but that all Memorials were lost , where Archiepiscopal or Patriarchal Seat resided (c). For although London hath been for many Ages the Chiefest of *Britain*, and was no less than 1300 years since reputed *Vetulus Oppidum*, and *Augusta* (d) ; yet a Modern Writer of great Learning and Authority , would have *Tork* as the more Ancient Metropolis of the Diocese of the *Britains* (e) ; and that not onely because it was a *Roman Colony* which *London* was not , as *Onuphrius* (contrary to so great and plain Authority of *Tacitus*) doth affirm (f) : but also, for that the Emperour's Palace , and *Prætorium* likewise , Tribunal or Chief Seat of Judgment , was there ; whence by the old Historian *Spartianus* it was called *Civitas* by way of excellency (g). It must be acknowledg'd , that the very Original of things are to us much clouded in obscurity and uncertainty ? yet he that duly consults Antiquity , will find , That what *Radulphus de Diceto* writes touching the Original of Episcopacy and Archiepiscopacy in *Britain* , seems to have the best Analogy with the truth , comparing one Antiquary with another touching that Subject. This *Radulphus de Diceto* was Dean of *London* , a very Ancient Historian , he wrote the History of *England* , from A. 1147. to 1193. in a Book entituled *Imagines Historiarum* ; and in the Prologue to his *Chronicle Abbreviations* says , That *Augustine* (who by Pope Gregory was sent into *England* , An. 600.) after he had Converted *Ethelbert* King of *Kent* to the Christian Faith , went in the year 602 to *Arles* , where he was Consecrated *Episcopus Anglorum* by *Etherius* Archbishop of that place ; and being returned into *Britain* sent *Laurentius* the Presbyter , and *Petrus* the Monk to Pope Gregory , giving him an account of *Britains* being converted to the Faith , and himself made Bishop thereof : Whereupon the said Gregory sent them back into *England* , and with them several Divines to preach the Gospel in this Isle , among which the Chief were *Mellitus* , *Iustus* , *Paulinus* ,

(r) *D. Usserius*
in primord.
pag. 97.

(d) *Ammian.*
Marc. lib. 4.

(e) *Philip*
Berterius,
Pithanon
Diatrib. 1.
c. 3. fin.
(f) *Onuphr.*
in Imperio
Romano.

(g) *Spartian.*
in Severo.
Vid. Burt.
Com. in An-
ton. p. 83. Cyc.

nus, and *Ruffinianus*, by whom he also sent the *Pall* to *Augustine*, and at the same time wrote him in what manner he should *Constitute Bishops in England*, and that in *hæc verba*, viz. *Per locos singulos 12 Episcopos ordines, qui tuæ subiaceant ditioni, quatenus Lundoniensis Civitatis Episcopus semper in posterum à Synodo propria debeat Consecrari, &c. Ad Eboricum vero Civitatem te volumus Episcopum mittere, quem ipse judicaveris Ordinare. Ita duntaxat, ut si eadem Civitas cum finitimis locis Verbum Dei receperit, ipse quoque 12. Episcopos ordinet, & Metropolitani honore fruatur. Quem tamen tuæ Fraternitatis volumus dispositioni subiacere. Post obitum vero tuum ita Episcopis quos ordinaverit præsit, ut Lundoniensis Episcopi nullo modo ditioni subiaceat. Sit vero inter Lundoni & Eboricæ Civitatis Episcopos in posterum honoris ista Distinctio, ut ipse prior habeatur qui prius fuerit Ordinatus. Tua vero Fraternitas Episcopos quos ordinaveris, qui vel per Episcopum Eboracæ fuerint Ordinati, Sacerdotes etiam totius Britannix Subiectos habeat* (b). After the receipt of these Orders from Pope Gregory, the Bishops of Britain were conven'd to a Conference by *Augustine*, he having first Ordained the said *Laurentius* as his Suffragan, the said *Mellitus* Bishop of *London*, and the said *Justus* Bishop of *Rochester*: About which time King *Ethelbert* built *St. Pauls Church London*, or re-edified the same (i). About this time also it was, viz. An. 608. that Pope *Boniface* obtain'd of the Emperour *Phocas*, That the Church of *Rome* should be the Head of all other Churches, (That of *Constantinople* having till then assumed that Title) the which was after Decreed *sub Anathemate* in a Council of 62 Bishops. Afterwards the said *Laurentius*, *Mellitus*, and *Justus*, became Archbishops of *Canterbury* successively, viz. *Laurentius* in An. 615. *Mellitus* in An. 622. and *Justus* in An. 626. according to the computation of the said *Radulphus*; by the last of which *Paulinus* was Ordained Archbishop of *Tork* (k), and to which *Justus* Pope *Boniface* wrote in *hæc verba*, viz. *Authoritati beati Petri*

(b) Hist. Angl.
 Script. Antiq.
 Radulph. Ab.
 bre. Chron.
 Col. 435. 436.

(i) Beda, l. 2.
 c. 3.

(k) Bed. l. 2.
 c. 9.

præcipientes firmamus, ut in Dorobernia Civitate semper in posterum Metropolitanus totius Britanniae locus habeatur, omnesque Provinciae Regni Anglorum præfati loci Metropolitanæ Ecclesiæ subjiçiantur. Again, the precedency of the See of Canterbury is recorded by the said *Rodolphus* in these words, viz. *Sicut Cantia subjiçitur Romæ, quod ex ea fidem accepit, ita Eboricum subjiçitur Cantuariæ, quæ eo Prædicatores misit. Sicut igitur sedes Cantuariæ prima fuit in fide, prima sit in honore.* After *Iustus*, *Honorius* was made Archbishop of Canterbury, whom *Paulinus* consecrated at *Lincoln*; to whom *Honorius* Pope wrote in hæc verba, viz. *Cum Dorobernensis Antistes, vel Eboracensis de hac vita transferit, is qui superest habeat potestatem*

alterum ordinandi. Bed. lib. 2. cap. 16, *Si de Consecrationibus Archiepiscoporum Cantuar. contrarium aliquid inveneris in Authentico Libro, quam in hoc volumine reperiatur, adquiescam in omnibus.* And in the year 632. Pope *Honorius* wrote unto *Honorius* Archbishop of Canterbury in these words, viz. *Tuæ Jurisdictioni subjiçi præcipimus omnes Angliæ Ecclesias & Regiones, & ut in Civitate Dorobernia Metropolitanus Locus & honor Archiepiscopatus, & Caput omnium Ecclesiarum Anglorum semper in posterum servetur.*

It is reported
That *Fridona*
a Saxon
was the first
English Arch-
bishop, and of
the See of
Canterbury
in the Seventh
Century, about
the year 656.
Fuller Church
Hist. Cent. 7.
p. 84. nu. 85.

That the Archiepiscopal Seat at *York* is likewise of very great Antiquity, is evident by what is forementioned touching *Paulinus* Archbishop thereof above one Thousand years since: Our learned Antiquary tells us, *Ex Patriis Scriptoribus*, That *York* was adorned with an Episcopal Seat by *Constantinus*; But if so, or if that be the truth which is recorded of *Paulinus* aforesaid, how then could *Faganus*, sent hither by Pope *Elutherius* to King *Lucius*, to plant the Christian Religion, be (as reported) the first Archbishop thereof (1)? or how could King *Lucius* place there one *Theodosius*, which yet is also affirmed (m)? Or how could *Sampson* under the same King be Bishop of *York*? as appears by *Godwin*, who yet suspects it, in regard that at the first entertainment of Christianity among us, nor Hebrew,

(1) Anonym.
qui de Ar-
chiepisc. E-
bor. scripsit.
An. 1460.
(m) Harris.
descrip. Bri-
tan. l. i. c. 7.

nor

nor Greek Names of the New Testament were so rise among the *Britains*; and indeed this *Sampson* is more generally reserved to some Ages after, till King *Arthur's* time. Thus the Original of things (as aforesaid) seems full of obscurity and uncertainty; yet it is most probable, that the first Bishop of *Tork* was not till *Constantine's* days; and we shall find this Bishop at *Arles*, in the Council there held about the year 314. whither (as himself writes in his Epistle to *Chrestus* Bishop of *Syracuse* (n) he summoned (to hear the Cause of the *Donatists*) many Bishops from divers places. In the last Edition of this Council, published by *Jacobus Sermondus* at *Paris*, among other Subscriptions thereunto, you have out of *Britain* these following, viz. *Eborius Episcopus, de Civitate Eboracensi, Provincia Britannia. Restitutus Episcopus, de Civitate Londinensi, Provincia superscripta. Adelphus Episcopus, de Civitate Colonia Londinensium, exinde Sacerdos Presbyter, Arminius Diaconus.* From which Council at *Arles* it may be observed, (1) That *Tork* was no Archbishoprick at that time, as neither indeed was *Rome* it self. (2) That *Eborius* Bishop of *Tork* at this Council takes place of *Restitutus* Bishop of *London*, where (as some suppose) the Primacy always remained, till translated to *Canterbury*. Whether *Constantine* the Great (who is supposed to have adorned *Tork* with an Episcopal Seat, as aforesaid) were Born there, and not elsewhere, as some conceive, is not easily, at least not expressly proved out of the *Ancients*, says a Learned Antiquary of Late time; yet (says he) That Authority seems to be drawn from them, which the Ambassadors of *England* made use of, and that in the hearing of the learned World then, both at the Council of *Constance*, An. 1414. as also at that of *Basil*, An. 1431. At the Council of *Constance*, there being a Contest about Precedency between the *English* and *French* Ambassadors, the *English* have these words, viz. *'Domus Regalis Angliæ Sanctam Helenam, cum suo filio Constantino Magno Imperatore, nato in urbe*

(n) Euseb.
Ecl. Hist.
l. 10. c. 5.

Pag. 9.

See the admir'd Selden,
ad Eutichii
Origines,
Pa. 122.

Burt. Com. m.
Antonin. fo.
81.

‘*Regia Eboracensi, educere comperta est*: The Royal House of *England*, it is known for certain, brought forth *Helena*, with her Son *Constantine the Great*, Emperour, Born in the Royal City *Eboracum*. Likewise, the English at *Basil* opposing the Precedency of *Castile*, say thus, viz. ‘*Constantium illum Magnum, qui Primus Imperator Christianus* (so are their words) ‘*Licentiam dedit per universum Orbem Ecclesias constituere, immensa ad hoc conferens bona, Peternæ natum in Eboracensi Civitate*: That *Constantine*, who being the first Christian Emperour, gave leave to build Churches throughout the World, was Born at *Peterne* in the City of *York*. By this they mean *Bederne*, a College of Vicars there, sometime serving the Quire, which (as also *Christchurch*) called in Ancient Charters *Ecclesia Sanctæ Trinitatis in Curia Regis*, is verily thought to have been part of the Imperial Palace in old time; which seems the more probable by what *Herodian* Writes, viz. That *Severus* the Emperour, and his eldest Son *Antoninus*, sate at *York* about Private and Common affairs, and gave their Judgment in ordinary Causes (o), as in that of *Cæcilia* about recovery of Right of Possession; The Rescript or Law of which matter is to this day preserved in the Code (p), whereon the Learned *Cuiacius* of Great Britain hath made very remarkable Observations (q). This was that *Septimius Severus*, Emperour of Rome, and Master of the World, who in this Isle breathed his last, and who, when he saw there was nothing to be expected but Death, called for the Urn wherein he had appointed his Ashes (after the *Offilegium* (r) should be put, and viewing it very exactly, *Thou shalt hold* (said he) *the Man whom the World could not contain* (s). No wonder then, that this City of so great Renown and Antiquity, was adorned with an Archiepiscopal Seat above a Thousand years since, as aforesaid; yet it never had those high Privileges or Prerogatives which were, and are peculiar to the Archiepiscopal See of *Canterbury*, whereof the Power (next under the Crown)

of

(o) Herod.
Hist. lib. 3.

(p) C. de Rei
vindicat.

(q) Seld. Ana-
ect. Angl.
Brit. lib. 1.
cap. 7.

(r) Offilegi-
um, or the
gleaning up of
his Bones.

(s) Dio. Cassi-
us Hist. Rom.
l. 76.

of convening Councils and Synods is not the least. *Ger-
vafius* in his *Chronicle de Tempore H. 2.* tells us, That
RICHARDUS CANTUARIENSIS *Archi-
episcopus totius ANGLIÆ Primas & Apostolicæ Se-
dis Legatus, Convocato Clero ANGLIÆ, celebravit
Concilium in Ecclesia Beati PETRI ad WESTMO-
NASTERIUM 15. kal. Junij Dominica ante Ascen-
sionem Domini An. 1175. In hoc Consilio ad dextram
Primatis sedit Episcopus LONDONIENSIS, quia
inter Episcopos CANTUARIENSIS Ecclesiæ
Suffraganeos DECONATUS præminet dignitate:
Ad sinistram sedit Episcopus WINTONIENSIS,
quia CANTORIS officio præcellit.*

The Church when Disdiocesan'd by Death, Transla-
tion or otherwise, or *quasi viduata* whilst the Bishop is
employed about Transmarine Negotiations in the Ser-
vice of the King or Kingdom, the Law takes care to
provide it a Guardian *quoad Jurisdictionem Spiritua-
lem*, during such vacancy of the See or remote absence
of the Bishop, to whom Presentations may be made, and
by whom institutions, Admissions, &c. may be given;
and this is that Ecclesiastical Officer, whether he be the
Archbishop, or his Vicar General, or Deans and Chapters,
in whomsoever the Office resides, him we commonly
call the *Guardian of the Spiritualities*. The Power
and Jurisdiction of this Office in the Church is very
Ancient, and was in use before the time of King *Ed-
ward* the First; it doth cease and determine so soon as a
new Bishop is Consecrated to that See that was vacant,
or otherwise Translated, who needs no new Consecra-
tion. This Ecclesiastical Office is in being immediately up-
on the vacancy of an Archiepiscopal See, as well as when
a Bishoprick happens to be vacant. Beside the Presenta-
tions, Admissions, Institutions, &c. aforesaid, that this
Officer is legally qualified for, he may also by force of
the Act of Parliament made in the Five and twentieth
year of King *Henry* the Eighth, grant *Licenses*, *Dis-
pensations*, *Faculties*, &c. which together with such
Instruments, *Rescripts*, and other Writings as may be
granted

*Guardians of
the Spiritual-
ties.*

granted by virtue of the said Statute, may be had, made, done, and granted under the Name and Seal of the *Guardian of the Spiritualities*: And in case he shall refuse to give the same an effectual dispatch, where by Law it may and ought to be granted, in every such case the Lord Chancellor of *England*, or Lord Keeper of the Great Seal, upon Petition and Complaint thereof to him made, may issue his Majesties Writ directed to such *Guardian of the Spiritualities*, requiring him by virtue of the said Writ, under a certain penaky therein limited by the said Lord Chancellor or Lord Keeper, to grant the same in due form of Law, otherwise (and no just and reasonable cause shewed for such refusal) the said penalty may be incurr'd to his Majesty; and a Commission under the Great Seal issued to two such Prelates or Spiritual persons as shall be nominated by his Majesty, impowring them by virtue of the said Act to grant such Licenses, &c. as were so refused to be granted by the Guardian, &c. as aforesaid.

*Congé d'Esli-
re, Election,
&c.*

The first thing in order to the *Election* of a Bishop, in the vacancy of any Episcopal See, is (and ever hath been since the time of King *John*) the Royal *Congé d'Eslire*, which being obtain'd, the Dean and Chapter proceeds to *Election*. It cannot legally be doubted, but that the consent of the *Dean* is not only requisite, but also necessary to the *Election* of a Bishop, as appears by an Ancient Contest above five hundred years since; between the Dean and Canons of *London* touching the Election of *Anselme*. Soon after King *Stephen* came to the Crown, he conven'd a Council at *Westminster* vo-

*Radulph. de
Diacco. Abbre.
Chronic. de
Reg. Steph. R.*

cati sunt ad Concilium (says an Historian) *WILLI-
ELMUS DECANUS LUNDONIE*, simul
& *Canonici*. *Cum autem haberetur Tractatus de Concilio
Lundoniensis Ecclesiæ tunc vacantis, nec in aliquem
possent unanimiter convenire, recesserunt à Decano Ca-
nonicorum multi, citra conscientiam ejus ANSELMUM
Abbatem in Episcopum Eligentes. Canonici vero, quos
Decanus habebat secum in Mensa diebus singulis, Ap-
pellaverunt, nec Regis occurrerunt offensam. Canonici
quidem*

quidem alii, quia quod fecerant, tam Regi quam toto Concilio videbatur iniquum, Regis indignationem plurimam meruerunt, quorum aliqui bonis suis spoliati sunt. The Pope afterwards having on this occasion a solemn Conference with his Cardinals, *Albericus Hostiensis Episcopus, quod sequitur pronunciavit in Publicum, Quoniam Electio Canonorum Lundoniensium citra conscientiam & Assensum Decani facta fuit, cujus est Officium in Eligendo Pastore suo de jure primam vocem habere, Nos eam auctoritate beati Petri devocamus in irritum.* So that according to this Ancient President, the Election of a Bishop may not be without the consent of the Dean; yet this we find upon Record nigh as Ancient as the former; That where at present there was no Dean, there the Election of the Bishop hath been by the Canons alone, *Canonici Saresbirienses Decanum non habentes ad præsens, à Rege prius impetrata Licentia, Fratrem suum & Concanonicum Herebertum Cantuariensem Archidiaconum, Assensu Communi solemniter in Episcopum Elegerunt. Electionem factam in Publico recitavit Walterus Præcentor: Electioni factæ præbuit Rex Assensum, quam & Hubertus Cantuariensis Archiepiscopus Auctoritate propria Confirmavit, &c.* Consonant to which method is the act of Parliament made in the 25 of H. 8. whereby it is Enacted, That on the vacancy of every Bishoprick, his Majesty should issue out his Writ of *Congé d'Eslire* to the Dean and Chapter of the Church so vacant, enabling them to proceed to Election of another Bishop; which Election being returned by the said Dean and Chapter, and ratified by the Royal Assent, his Majesty should issue out his Writ to the Metropolitan to proceed to the Confirmation of the party Elected, and taking to himself two other Bishops at least, to proceed to Consecration, in case he had not before been Consecrated Bishop of some other Church.

The place of Consecration of Bishops was anciently at *Consecration* Canterbury, as the Mother-Church not only of that Province, but of all England; for when in the time of

R. 1. An. 1192. a Bishop of Worcester Eleſt was to be Conſecrated, and Weſtminſter the place deſign'd for that ſolemnity according to the Popes Command, it was oppoſed by the Prior and Covent of Chriſt-church in Canterbury, and at a time when the Archbiſhop thereof (whoſe preſence could not but have ſtrengthened that oppoſition) was abſent; yet the ſaid Prior inſiſting on the Privileges and Cuſtomes of the Church of Canterbury, oppoſed the ſaid place of Conſecration, as appears by his Letter to the Biſhop of Ely, the Popes Legate, and other Biſhops of that Province, in hæc verba, Reverendis in Chriſto Dominis & Fratribus W. Dei gratia Helienſi Epifcopo Apoſtolice ſedis Legato, Domini Regis Cancellario, cæteriſque Epifcopis Cantuarienſis Eccleſiæ Suffraganeis, O. Prior & Conventus Eccleſiæ Chriſti Cantuariæ ſalutem ab Auctore ſalutis. Noverit Sanctitas veſtra, Nos ad ſedem Apoſtolicam appellafſe, ne Wigornienſis Eleſtus alias quam in Eccleſia Cantuarienſi, ſicut moris eſt, Conſecretur, & ne quis veſtrum, qui indemnitati Eccleſiæ Cantuarienſis vinculo Profeſſionis providere tenemini, alias quam in eadem Eccleſia ejus Conſecrationi intereſſe præſumat. And at a Synod held at Weſtminſter under P. Honorius 2. in the Reign of H. 1. An. 1126. it was Ordained, That at the Conſecration of Biſhops nothing ſhould by way of Offerings be exacted or by force required. Statuimus & Apoſtolica Authoritate Decernimus, ut in Conſecrationibus Epifcoporum, &c. nil omnino per violentiam, niſi ſponte oblatum fuerit, penitus exigatur. Simeon Dunelm. Hiſt. de Geſt. Reg. Angl. The like you have Decreed at another Synod held alſo at Weſtminſter under P. Innocent 2. in King Stephen's Reign, An. 1138. Apoſtolica authoritate Sancimus, ut in Conſecrationibus Epifcoporum ne quicquam ab Epifcopo vel Miniſtris ejus exigatur. Hiſt. Richard. Prioris Haguiſtald. de Geſt. Reg. Steph. In the year 1123. which was in the Reign of H. 1. at the Council of Three hundred Biſhops conven'd at Rome, P. Calixtus 2. being Preſident, it was Decreed, That no Biſhop ſhould be Conſecrated, unleſs he were firſt Canonically

Chron. Ger-
vas. de Temp.
R. 1.

Canonically Elected. *Nullus in Episcopum nisi Canonice Electum Consecret, quod etsi prescriptum fuerit, & Consecratus & Consecrator absque recuperationis spe deponatur.* dict. Sim. Dunelm. Hist. As that Canon was not in being, so the matter thereby ordained, in all probability was far from being observed, when *Phlegmundus* Archbishop of *Canterbury*, whom *P. Formosus* honoured with the *Pall*, Consecrated no less than Seven Bishops in one day, in the two and twentieth year of King *Alured*. *Chron. Johan. Bromton, Abbatis Jormalensis.* When a Bishop is Consecrated, then may he Consecrate *viz.* Churches, &c. and may ordain Deacons, &c. But it was long since provided by the Council of *Lateran*, under *P. Alexander*, That the Bishop should not confer Holy Orders on any that were not then, or speedily to be provided with an Ecclesiastical Living. *Episcopus, si aliquem sine certo Titulo, de quo Necessaria vitæ percipiat, in Diaconum vel Presbyterum Ordinaverit, tam diu ei necessaria subministret, donec et in aliqua Ecclesia convenientia stipendia militiæ clericali assignet, nisi talis forte, qui Ordinatur, extiterit, qui de sua vel paterna hæreditate subsidium vitæ possit habere.* Can. 9. And as touching the Bishops Consecrating of Churches, it being vulgarly supposed that there is a considerable piece of Superstition therein, it cannot but be seasonable here to enquire whether so or no, or whether the Consecration of Churches be not truly Primitive, according to the Judgment of the Learned *Dr. Heylin*. To which purpose you have here his very words, *viz.* The place of Publick Worship is called generally (according to the style of the Ancient Fathers) by the name of the Church: For Consecrating or setting apart thereof to Religious uses, I find (says he) so great Authority in the Primitive times, as will sufficiently free it from the guilt of Popery: Witness the Testimony which *Pope Pius* gives of his Sister *Eutroepia* in an Epistle to *Justus Viennensis*, An. 158 or thereabouts, for setting apart her own House for the use and service of the Church: Witness the Testimony which *Metaphraustes*

aphrastes gives of Felix the First, touching his Consecrating of the House of Cecilia, about the year 272. And that which Damasus gives unto Marcellinus, who succeeded Felix, for Consecrating the House of Lucinia for Religious uses: Witness the famous Consecration of the Temple of the Holy Martyrs in Jerusalem, Founded by Constantine the Great, At which almost all the Bishops in the Eastern parts were summoned and called together by the Emperour's Writ: and finally (not to descend to the following Times) witness the 89th Sermon of St. Ambrose, entituled De Dedicatione Basilicæ, Preached at the Dedication of a Church built by Vitalianus and Maianus, and the Invitation of Paulinus, another Bishop of that Age, made by Sulpitius Severus his especial Friend, Ad Basilicam quæ prœrexerat, in Nomine Domini consummabitur, Dedicandum, to be present at the Dedication of a Church of his Foundation. Heyl. Cyprian, Angl. p. 12.

The Decree of Faith made by the Council of Trent, was attended with no less than Eight Anathematisms; the first whereof was against him that shall say, That there is no visible Priesthood in the New Testament, nor any power to Consecrate, &c. For in the beginning of that Decree it is affirmed, That there is a visible and external Priesthood, in which power is given, by Divine Institution, to Consecrate the Eucharist, &c. In which Decree the Synod doth also condemn those who say all Christians are Priests, or have equal Spiritual power, which is nothing but to confound the Ecclesiastical Hierarchie, which is in an Order, as an Army of Souldiers; To which Hierarchycal Order do belong especially Bishops, who are superiour to Priests. Therefore one of the said Anathematisms did reach those who say, that there is not an Hierarchie instituted in the Catholick Church, by Divine Ordination consisting of Bishops, Priests, and Ministers. The Historian of the aforesaid Council of Trent tells us, That the Sixth of the said Eight Anathematisms was much noted in Germany, in which an Article of Faith was made of

Hierar-

Hierarchy; which word and signification thereof (*says he*) is Alien, not so say contrary to the Holy Scriptures; and though it was somewhat Anciently invented, yet the Authour is not known; and in case he were, yet (*says he*) he is an Hyperbolical Writer, not imitated in the use of that word by any of the Ancients: and following the style of the Primitive Church, it ought (*says he*) dia. lib. 8. to be named not *Hierarchy*, but *Hierodiaconia*, or *Hierodoulia*. But *Thomas Passus*, a Canon of *Valentia*, said in that Council, That all doubt made of the Ecclesiastical *Hierarchy*, did proceed from gross ignorance of Antiquity; it being a thing Notorious, that in the Church the people have alway been governed by the Clergy, and in the Clergy the Inferiours by the Superiours, untill all be reduced unto one Universal *Reclour*, which is the Pope of *Rome*; and that it was plain that the *Hierarchy* consisteth in the Ecclesiastical Orders, which is nothing but an holy Order of Superiours and Inferiours. But *Francis Forrier*, a Dominical of *Portugal*, at the same time said, That *Hierarchy* consisteth in *Jurisdiction*, and the Council of *Nice* placeth it in that, when it speaketh of the Bishop of *Rome*, *Alexandria* and *Antioch*, and therefore the handling of *Hierarchy* not to be joyned with that of *Order*. Others were of a Third opinion, *viz.* That *Hierarchy* was a mixture of both, *viz.* of *Order* and *Jurisdiction* also. Thus was that Learned Council divided in this high point of *Hierarchy*, that though they all agreed the thing, yet they could not agree wherein to fix it, whether in *Order*, or in *Jurisdiction*, or in *both*. Notwithstanding it is generally agreed, That the *Hierarchy* of the *Catholick Church* is proved by the Testimony of all Antiquity, and by the continual use of the Church, and that it consisteth of Prelates and Ministers, who are Ordained by Bishops, in whom resides the power of *Consecration*, which may be a sufficient warrant for this digression. Which *Consecration*, as it refers to *Persons*, is done *per impositionem manuum*, except as to *Virgins*; for they also by the *Pontifical Law* are *Consecrable* Creatures,

tures, , though they be *Foolish Virgins*, yea, though they be *Polluted Virgins*, provided it be not *per spontaneam & voluntariam pollutionem*, and there be but *putativa Virginitas* in the case ; and shall have not onely *Laureolam Virginitatis* , but also *Velum Consecrationis*, as they call it. *Cajetan. in Sum. V. Virgin. consecrat. & Less. de Just. & Jur. lib. 4. c. 2. Dub. 16. & alii DD.* But where the *Consecration* refers to *Things*, as Churches, Chapels, Bells, and other things of the like sound, there it is done *per preces* together with other *Consecration ceremonies*, the *Episcopal Order* therein concurring : so likewise the *Consecration* of Virgins is *per preces*, together with other *Ceremonies* used in the *Consecration* of Virgins, *Cujus Signum est, quod in Pontificali Romano, ubi de hac Consecratione agitur, non dicatur roganda de aliqua contaminatione, sed de vita, conscientia & carnis integritate, ut notat Cajetanus, Less. ubi sup.*

Deans and
Chapters.

That which is next in view, is some prospect of *Deans and Chapters* ; there were it seems in former times certain *Deans*, who usurped an Authority beyond their Dignity or Function, and took upon them to exercise *Episcopal Jurisdiction*. These were condemn'd in a Council at *Lateran* under Pope *Alexander*, by the fifth Canon of that Council in these words, *viz. Quoniam quidam in quibusdam partibus sub pretio statuuntur, qui Decani vocantur, & pro certa pecuniæ quantitate Episcopalem Jurisdictionem exercent, præsentis Decreto statuimus, ut qui de cætero id præsumpserit, Officio suo priuetur, & Episcopus conferendi hoc officium potestatem amittat.* *Chron. Gervas. de Temp. H. 2.* Anciently likewise there were certain *Deans* which were called *Decani Christianitatis*; one of which kind appears in an Ancient Record nigh Four hundred years since, relating to the Privileges of the Priory of *St. Austins* wherein the words to this present purpose sic se habent, *viz. Super Privilegiis Innocentii Papæ 4. hic superius ad mandatum conservatorum, ut præattum est, publicatis, Thomas Prior Ecclesiæ Christi Cant.*

Guydo

Guido Prior S. Gregorii, & Thomas Decanus Christianitatis ejusdem Civitatis eadem Privilegia inspexisse ad certitudinem futurorum testati sunt. Chron. W. Thorn. de Temp. Ed. 1. An. 1293. Heretofore also Priors have been called *Deans*; so we find *Ceolnothus* or *Chelnothus* (in the time of King *Etheldred* and his Brother *Alured*) Dean of *Canterbury* to have been called, *Postea Ceolnothus Cantuariensis Ecclesiæ Decanus, &c. ubi cum Decanus esset, quem nos Priorem vocamus, non modicum videre solebat Conventum.* And again, *Egelnothum, alias Ceolnothum, ejusdem Ecclesiæ Christi Decanum, vel Præpositum suum Decanum vocabant, quem nos post adventum Lanfranci Priorem appellamus.* Gervaf. Act. Pontif. Cant. And where we meet with the word *Decania*, as in the History of *Ranulphus* Bishop of *Durham* in the *Conquerour's* time, written by *Simeon* the Monk, *Deconatus* is thereby intended, it being the Ecclesiastical Dignity of him, *qui, in Majori Ecclesia, denis ad minus Canonicis sive Prebendariis (ut vocant) sub Episcopo præst;* but the *DECANUS CHRISTIANITATIS* aforesaid, so called per *Antiquiores* Anglos, is secundum recentiores *DECANUS RURALIS, quem Exteri ARCHIPRESBYTERUM VICANUM* vocant. De quo & de *Urbano* vid. *Duaren. de Sacr. Eccl. minist. & benef. lib. 1. cap. 8.* A probable conjecture why anciently he might be called *Decanus Christianitatis*, we may (*ut mihi videtur*) have from Mr. *Selden*, in *Notis ad EADMERUM*, pag. 208. *Christianitas* (says he) & ea quæ ad *Christianitatem* pertinent, passim apud *Eadmerum* atque alios illius ævi *Scriptores*, *functionem Episcopalem*, atque *Fori sacri actionem & administrationem*, seu *Officium Episcopale*, ut *usitatus appellatur*, denotant. — Hinc apud nos, *Fora sacra*, quibus, jure nempe communi subnixis aut *Episcopi præsunt*, aut ii qui eo nomine *Episcopos*, utpote quos provocare licet, suscipiunt, *Curia Christianitatis etiamnum vocantur*. *Glossar. Hist. Angl. Antiq. ver. Christianitas.* — vid. *plura in Urbis Cantuar. Antiq. pag. 362, 363. ubi de Decano Christianitatis.* But the *Deans* here

here specially meant and intended, are onely such as with the *Chapters*, according to the ancient and genuine use thereof, are as *Senatus Episcopi* to assist the Bishop in his Jurisdiction. Cathedral Churches being the first Monuments of Christianity in England. So Dr. Hacker in Parliament, 1640.

Archdeacons.

The Office and Ecclesiastical Dignity of *Archdeacons*, which you next meet with in this Abridgment, is of very great Antiquity. There was a sharp Contest above Five hundred years since, in the time of King *H. 2.* between the *Archdeacons* and the *Priors* of *Winchester* and *Ely*, touching the Presentation of their Bishops Elect unto the *Metropolitan* in order to their Consecration, wherein by the Interlocutory of the said *Metropolitan* the *Priors* had the Victory. *Hora congrua Consecrationis instante R. Wintoniensis & R. Elyensis Archidiaconi, cum Officiales Episcoporum dicantur, ad suum spectare contendebant Officium Electiones, &c. præsentrare Metropolitanò: W. Wintoniensis & S. Elyensis Priores in contrarium sentiebant: quam enim in Ecclesiis Cathedralibus, ubi Canonici divinis mancipantur obsequiis, Decani sibi vindicant dignitatem: hanc si Monachorum Conventus in Episcopali sede præmineat, sibi jure possunt vendicare Priores. Sed ut omnis in posterum amputetur occasio Litigandi, de Interlocutoria Metropolitanæ sententia, &c. Wintoniensis & Elyensis Electi, ad Priorum suorum præsentationem recepti, ad Priorum suorum postulationem Episcopi Consecrati sunt.*—Radulph. de Diceto *Imag. Hist.* By the 25th Canon of the Council of *Lateran* under Pope *Alexander* it was Ordained, That an *Archdeacon* in his Visitation should not exceed the number of Five or Seven Horsemen for his Retinue. *Chron. Gervas. de Temp. H. 2.* And as to the Visitation-Articles, every Bishop and Archdeacon heretofore framed a Model thereof for themselves; but at the Convocation in the year 1640. a body thereof was composed for the publick use of all such as exercised Ecclesiastical Jurisdiction. And by the foresaid Canon of the Council of *Lateran*, it was farther

ther Ordained, That no Archdeacon in his Visitation should presume to exact from the Clergy more than was justly due, *Archidiaconi autem sive Decani nullas exactiones in Presbyteros seu Clericos exercere presumant.* Notwithstanding what toleration the Law allows as to Archbishops, Bishops, Archdeacons, &c. as to the number of their Retinue in their Visitations; yet therein respect is ever to be had to the condition of the Churches, Persons, and Places Visited, as may plainly appear by the express words of the Canon aforesaid, *viz. Sane quod de numero electionis secundum tolerantiam dictum est, in illis locis poterit observari, in quibus ampliores sunt redditus & Ecclesiastica facultates. In pauperibus autem Locis tantam volumus teneri mensuram, ut ex accessu majorum minores non debeant gravari; ne sub tali indulgentia illi qui paucioribus Equis uti solebant hactenus, plurimum sibi credant potestatem indultam.* So that no Archdeacon or other having Right of Visitation, ought by what the Law allows them in that case, to exercise their power in this matter, beyond what the condition of the place Visited will reasonably admit.

In all Visitations of Parochial Churches, made by Bishops and Archdeacons, the Law hath provided that the Charge thereof should be answered by the *Procurations* then due and payable by the Inferiour Clergy wherein Custom as to the *Quantum* shall prevail; but the undue Demands and supernumerary Attendants of Visitors have Anciently, as well as in Later times, given the occasion of frequent Contests and Complaints: For prevention whereof it was Ordained by the 25th Canon of the Council of Lateran under Pope Alexander, circa An. 1179. *in hæc verba, viz. Cum quidam Fratrum & Coepiscoporum nostrorum ita graves in Procuracionibus subditis suis existunt, ut pro hujusmodi causa interdum ipsa Ecclesiastica Ornamenta subditi compellantur exponere, & longi temporis victum brevis hora consumat. Quocirca statuimus, Quod Archiepiscopi Parochias Visitantes, pro diversitate Provinciarum & facult-*

facultatibus Ecclesiarum 40 vel 50 evellionis Numerum, Episcopi 20 vel 30, Cardinales vero 20 vel 25 nequaquam excedunt. Archidiaconi vero Quinque aut Septem, Decani Constituti sub Episcopis, Duobus Equis contenti existant. Prohibemus etiam, ne subditos suos talliis & exactionibus Episcopi gravare præsumant. Archidiaconi autem, sive Decani nullas exactiones, vel tallias in Presbyteros, seu Clericos exercere præsumant. vid. Chron. Gervaf. de Temp. H. 2. col. 1455. can. 25. whereby it is evident, that these *Procurations* ought to be so moderated by the Bishops, as that they may not become a burthen or grievance to the Clergy. The lawfulness of these Episcopal and Archidiaconal Rights of *Procurations* are not to be called into question at this day; for in all the Establishments and Ordinations of Vicarages upon the Ancient Appropriations of Churches, you shall find these *Procurations* excepted, and reserved *in statu Quo*: as appears by these of *Feversham* and *Middleton*, when by *William the Conquerour* they were Appropriated to the Abbey of *St. Austins*; as also by these of *Wivelsburg*, *Stone*, and *Brocland* in *Kent*, when they were Appropriated to the same Abbey by the Charter of King *Ed. 3.* and in that of the Parish of *Stone* aforesaid, *Pentecostals* by name are reserved, in these words, *Nihilominus solvet Procuracionem debitam Archidiacono Cantuariensi Visitanti, & expensas pro Pentecostalibus faciendus.* — vid. Chron. W. Thorne, *Appropria. Eccles. col. 2089. Hist. Angl.* What *Procurations* the Archbishop of *Messena*, who arrived in *England* as the Pope's Legate in the year 1261. exacted and extorted from the Bishops and Abbats with great violence in the Reign of King *H. 3.* you may find in *Matthew Paris*. But by the fourth Canon of the Council at *Rome* under Pope *Alex. 3. An. 1180.* it was Ordained, That Bishops and Archbishops in their Visitations should not overcharge the Church of their Bounds, with unnecessary charges and expences, specially the Churches that are poor.

No sooner had Princes in Ancient times assign'd and limited certain Matters and Causes controversial to the cognizance of Bishops, and to that end dignified the Episcopal Order with an Ecclesiastical Jurisdiction; but the multiplicity and emergency of such affairs requir'd for the dispatch and management thereof the assistance of such subordinate Ordinaries, as being experienc'd in the Laws adapted to the nature of such Causes, might prove a sufficient Expedient to prevent the avocation of Bishops, by reason of such Litigious interpositions, from the discharge of the more weighty Concerns of that Sacred Function. Hence it is supposed, that the Ecclesiastical Office of Diocesan Chancellours, Commis-saries, and Officials originally came into use and practice, the place of their Session anciently styled the *Bishops Consistory*. Among the many Learned *Ecclesiasticks*, who have supplied that Ecclesiastical place, *William Lindwood* (who finished his industrious and usefull work of the *Provincial Constitutions* about the year 1433. in the time of King *Henry the Sixth*) seems to be of the highest Renown; his Education was in the University of *Cambridge*, first Scholar of *Gonvil*, then Fellow of *Pembroke-hall*; his younger years he employed in the study of the Imperial and Canon Laws; afterwards became Keeper of the Privy Seal unto King *Henry the Fifth*, by whom he was honoured with an Embassie to the Crowns of *Spain* and *Portugal*. After the King's death he reassum'd his Officials place of *Canterbury*, and then collected the Constitutions of the Fourteen later Arch-bishops of *Canterbury*, from *Stephen Langton* unto *Henry Chicheley*, unto whom he dedicated that highly to be esteemed Work, his Gloss thereon, being in it self as a Canonical Magazine, or the Key which opens the Magazine of the whole Canon Law. It was Printed at *Paris*, An. 1505. at the cost and charges of *William Bretton* Merchant of *London*, revised by the care of *Wolfgangus Hippolitus*, and Prefaced unto by *Jodocus Badius*. This Famous *Lindwood* was afterwards made Bishop of *St. Davids*.

Diocesan
Chancellours.

C
court Ecclesi-
astical.

By the Grant of *William the Conqueror* the Bishops originally had an entire Jurisdiction to Judge all Causes relating to Religion, for before that time the Sheriff and Bishop kept their Court together. He granted also to the Clergy Tithes of Calves, Colts, Lambs, Woods, Mills, &c. So that before the Conquest there were no such Courts in England as we now call Courts Ecclesiastical or Spiritual, for Anciently the Bishops sat in Judgment together with the Secular Judges and Sheriffs on the same Tribunal, specially about Easter and Michaelmas; which appears by Mr. Selden in his Notes on *Eadmerus*, pag. 167. as also by the Laws of King *Æthelstane*. *De- bent Episcopi cum Seculi Judicibus interesse Judiciis, ne permittant si possint, ut illinc aliqua pravitatum germina pullulaverint; & Sacerdotibus pertinet in sua Diocesi, ut ad rectum sedulo quemcunque juvent, nec pariantur si possint, ut Christianus aliquis alii no- ceat, &c.* Chron. Jo. Bromton. de Leg. *Æthelst.* Reg. And in the Preamble to the Laws of that King you will find these words, viz. *Debet etiam Episcopus sedulo pacem & concordiam operari cum Seculi Judicibus.* Yea, long after the Conquest, in the Reign of *H. 2.* An. 1164. by his Laws made at *Clarendon* the Bishops might interest themselves with the Kings Secular Judges, where the matter in Judgment extended not to diminu- tion of Members, or were Capital. An. 1164. *Congre- gati sunt Præsules & Proceres Anglicani regni apud Clarendoniam. Rex igitur Henricus, &c.* Then it fol- lows in *Lege undecima*, viz. *Archiepiscopi & Episcopi, &c. sicut Barones ceteri debent interesse Judiciis Cu- riae Regis cum Baronibus, usque perveniat in Judicio ad diminutionem Membrorum, vel ad mortem.* Not- withstanding, at the same time the Bishops Ecclesiastical Courts, as also the Archdeacons Courts, were established in this Kingdom, and farther ratified and confirmed by these very Laws of King *H. 2.* made at *Clarendon*, as appears by the Tenth Law, and that immediately fore- going the Premises, in hæc verba, viz. *Qui de Crui- tate, vel Castello, vel Burgo, vel dominico manerio*

Domini.

Domini Regis fuerit, si ab Archidiacono vel Episcopo de aliquo delicto Citatus fuerit, unde debeat eis Respondere, & ad Citationes eorum noluerit satisfacere, bene licet eum sub Interdicto ponere, sed non debet, &c. & exinde poterit Episcopus ipsam Accusatum Ecclesiastica Justitia coercere. Chron. Gerwasi. de Temp. H. 2. In those days there was no occasion for that just Complaint, which a Learned Pen (as a Modern Authour observes) makes, viz. That Courts which should distribute Peace, do themselves practise Duels, whilst it is counted the part of a Resolute Judge to enlarge the Privilege of his Court. Lord Bacon in his Advanc. of Learn. p. 463. Aphor. 96. — It was with more moderation expressed by him who said, It was sad, when Courts that are Judges, become Plaintiffs and Defendants touching the Bounds of their Jurisdiction. In the first Parliament of King Edward the Sixth's Reign it was Enacted, That all Process out of the Ecclesiastical Courts should from thenceforth be issued in the King's Name onely, and under the King's Seal of Arms contrary to the usage of former Times. But this Statute being Repealed by Queen Mary, and not Revived by Queen Elizabeth, the Bishops and their Chancellours, Commissaries, and Officials, have ever since exercised all manner of Ecclesiastical Jurisdiction in their own Names, and under the distinct Seals of their several Offices respective. Also by the Statute of 25 H. 8. c. 19. it being Enacted, That all former Canons and Constitutions, not contrary to the Word of God, the King's Prerogative, or the Laws and Statutes of this Realm, should remain in force, untill they were review'd by Thirty two Commissioners, to be appointed by the King, and that Review being never made in that King's time, nor any thing done therein by King Ed. 6. (though he had also an Act of Parliament to the same effect) the said Ancient Canons and Constitutions remain'd in force as before they were; whereby all Causes Testamentary, Matrimonial, Tithes, Incontinency, Notorious Crimes of Publick Scandal, Willfull absence from Divine Service, Irreverence, and other Mis-

demeanours in or relating to the Church, &c. no punishable by the Temporal Laws of this Realm, were still reserved unto the Ecclesiastical Courts, as a standing Rule whereby they were to proceed and regulate the Exercise of their Jurisdiction. *Vid. Heyl. ubi supr. p. 2, 3.* Touching the Ecclesiastical Jurisdiction, and what Matters and Causes should be cognizable in the Ecclesiastical Courts of *Normandy* in the Reign of King *Richard the First*, upon occasion of a Contest *inter Ecclesiam ROTHOMAGENSEM & WILLIELMUM Filium RADULFI*, Steward of *Normandy*, it was nigh Five hundred years since finally Accorded, Published, & (*inter alia*) Declared by all the Clergy, That all Perjuries and Breach of Faith (except in case of National Leagues,) all Controversies relating to Dowries and Donations *propter Nuptias (quoad Mobilia)* should be heard and determined in the Ecclesiastical Court; it was then also so many hundred years since farther Resolved in *hæc verba, viz. Quod distributio eorum quæ in Testamento reliquuntur, auctoritate Ecclesiæ fiet, nec Decima pars (ut solim) subtrahetur.* It was likewise at the same time and so long since farther Resolved, That *Si quis subitanea morte, vel quolibet alio Fortuito Casu præoccupatus fuerit, ut de rebus suis disponere non possit, Distributio Bonorum ejus Ecclesiastica auctoritate fiet.* — *Radulf. de Diceto. Hist. de Temp. Rich. 12. Regis.*

Churches and
Chapels.

Of all the Churches in Great Britain, that of Saint Paul's London is of the largest structure, if not of the highest Antiquity: Some will have it in Ancient times to have been the Temple of *Diana*, but the Ingenious Commentatour on *Antoninus's Itinerary*, though he will admit that *Diana* was indeed worshipped here in the Roman times, and had Temples here also, yet he will not agree it other than a Tradition to assert, That St. Paul's Church was formerly a Temple of *Diana*; and is free to conjecture, that Mr. *Selden* did but sport his Wit, and was not in good earnest, when he imagined that London might be called first *Lhan Dien*, that is, the

the Temple of *Diana* (a). The same may be said concerning the Temple of *Apollo*, on the Ruines of which, the report is, *St. Peters* at *Westminster* was founded (b). The Antiquary will also have it, That at *York* was *Belona's* Temple; and *Minerva's* Temple at *Bath*, and that from her the Town was called *Caer Palladour*, that is, the City of *Palladian* waters (c). They that will have the Church of *Rome* to be *Caput Ecclesiarum*, do ascribe it to Pope *Boniface*, that he obtained it of the Emperour *Focas*, because the Church of *Constantinople* writ her self *Primam omnium Ecclesiarum*: This was so Decreed in the year 608. by a Council of 62. Bishops *sub Anathemata* (d). At a Synod held at *Westminster* under Pope *Innocent* 2. in the Third year of King *Stephen* An. D. 1138. it was Decreed, That no Church should be built without Leave first obtained from the Bishop of the Diocese, *Apostolica autoritate prohibemus, nequis absque Licentia Episcopi sui Ecclesiam vel Oratorium constituat* (e). By the Fifth Law of *Ina* King of the *West Saxons* the Church is made a Sanctuary, *Siquis sit mortis Reus, & ad Ecclesiam fugiat, vitam habeat & emendet sicut rectum consulet* (f). At a Synod held at *Westminster* in the Reign of *H. 2.* An. 1175. it was ordained then, no Judgments touching Blood or Corporal punishment should be given in a Church or Churchyard; by the Sixth Canon made at that Synod, *Seculares Causas, in quibus de sanguinis effusione, vel de pœna Corporali agitur, in Ecclesiis, vel in Cœmeteriis agitari sub interminatione anathematis prohibemus* (g). By the Fifth Canon made at a Synod held in *London* during the Reign of *Edmond*, Father of *Edwin* and *Edgar*, who succeeded *Æthelstane*, at which Synod were present *Odo* and *Wulfstan* Archbishops, provision was for the Repairing of Churches, viz. *Ut omnis Episcopus resiciat Dei domos in suo proprio, & Regem ammoneat, ut omnes Ecclesiæ Dei sint bene paratæ* (h). The like you have in the 92. Law of King *Kanute*, *Ad refectionem Ecclesiæ debet omnis populus secundum Legem subvenire* (i). At a General Council held at *Rhemes* under Pope *Calixtus*

(a) Claric. Seld. illust. in Polyol. mag. Poetæ Angl. Cant. 8.

(b) Guil. Stephanides Descript. Lond.

(c) Spartian. Hist.

(d) Rad. de Diceto Abbr. Chron.

(e) Hist. Ri. Prioris Haggstad. de Gest. R. Ste. (f) L. 5. In R.

(g) Chro. Ger. de Temp. H. 2.

(h) Chron. Jo. Brampton de LL. Edm. (i) Idem de Legib. Kanuti Reg.

An-

An. 1119. during the Reign of H. 1. it was Ordained, That whoever invaded the possessions of the Church should be Anathematiz'd; *Universas Ecclesiarum possessiones, quæ Liberalitate Regum, vel Largitione Principum concessæ sunt, inconcussas in perpetuum, & inviolatas esse decernimus. Quod si quis eas abstulerit, aut invaserit, Anathemate perpetuo feriatur.* And by the Sixth Law of Ina aforesaid, if any man fought in the Church, he should forfeit Six pounds; *si quis in Ecclesia pugnet, 120 solid. emendet.* And although it be now looked upon as *Exaction* for a Parson to demand his Funeral dues of burial, where the deceased is carried out of his Parish to be buried in another, so it was long since Ordained by the Laws of King Kanute, leg. 16. *Si Corpus aliquod à sua Parochia deferatur in aliam, pecunia tamen Sepulturæ ejus jure in eam Ecclesi- am pertinebit.*

Churchwardens.

Among other Officers relating to the Church, those of *Churchwardens*, *Questmen*, and *Sidemen* are not to be omitted; for although they may be some of the Lower Form, yet they are of necessary use, and such as without whose care many disorders in the Church may pass unpunished, as well as the concerns thereof much prejudiced; for which end and reason the Law will have them to be a Corporation, qualifies them to Sue, subjects them to Suits, and understands them in the nature of Ecclesiastical Trustees as *Guardians* of the Moveable Possessions of the Church: Therefore the Canons have determined, as to the qualification of the persons Eligible, the manner of their Choice, by whom, and the time when, their Oath, Office, Duration, and Account when and before whom it shall be made, and how they shall be finally discharged.

Consolidation.

By reason of the great desolation and ruine of many Churches and Parishes in the late Unnatural War in this Kingdom, and otherwise, it hath been judged necessary to pass an Act of Parliament for the Uniting of certain Churches in Cities and Towns Corporate: Notwithstanding which, the Parishes to remain distinct as to all Rates,

Rates, Taxes, Parochial Rights, Charges and Duties, and all other Privileges, Liberties, and Respects whatsoever; wherein it is also Enacted, *That the Patrons of such Churches and Chapels so united shall Present by Turns onely to that Church, which shall remain and be Presentative from time to time, &c. Provided, That Parishes having 100 l. maintenance per An. may not be United.* Also the Incumbents of such united Parishes must be Graduates in some University. And the Owners of Improvements may bestow and annex Maintenance to the Churches where they lie, and settle it in Trust for the benefit of the said Parsonage or Vicarage, without any License of Mortmain. It is there also farther Enacted, *That if the settled Maintenance of such Parsonage, Vicarage, Churches, and Chapels so united, &c. shall not amount to the full summ of 100 l. per An. clear and above all charges and reprises, that then it shall be lawfull for the Parson, Vicar, and Incumbent of the same, and his Successours, to take, receive, and purchase to him and his Successours, Lands, Tenements, Rents, Tithes, and other Hereditaments, without any License of Mortmain; any Law or Statute to the contrary notwithstanding.* The Churches and Parishes in London, which by that Act since the Dreadfull Fire are United, are these, *viz. The Parishes of Alhallowes Breadstreet and St. John Evangelist are united into one Parish, and the Church of the former to be the Parish-Church of the Parishes so united. The Parishes of St Alban's Woodstreet, and St. Olaves Silverstreet are united into one Parish, and the Church of the former to be the Parish Church of the said Parishes so united. The Parishes of St. Austins and St. Faiths are united into one Parish, and the Church of the former to be the Parish Church of the said Parishes so united. The like order to be observed in all the of the Parish Churches that are by that Act united.*

Touching Dilapidations of Ecclesiastical Edifices and Possessions, it may well be presumed, That the most of that kind that ever was in the Christian World, was in the

the time of *Dioclesian's* Persecution; which moved *Constantine*, Son of *Constantius Chlorus*, who began his Reign in the year of our Lord 310. to give command for the Re-edifying and Repairing the Temples of the *Christians*; which was not onely expeditedly put in Execution, but many new Churches were also erected for the Convention of the *Christians*; and Idol-Temples shut up, until *Julian* the Apostate restored the Heathenish Idolatry. It hath ever belonged to the care and cognizance of the Church, to make provision for the Repair of the *Dilapidations* of the Church. Thus *Jeroboam* made it his business to repair the *Dilapidations* of the *Temple*: But although Controversies hence arising, and incident to this matter, are properly belonging to Ecclesiastical cognizance, yet they are not onely Ecclesiastical persons that are hereunto obliged; for although they alone are to prevent and repair, or make satisfaction for what part of the Churches Dowry themselves have suffered to be Dilapidated, whilst in their own possession; yet as to the Church it self, and the Incidents thereof, others as well as Ecclesiasticks are obliged to the Repairs thereof; for the *Steeple* with the *Body* of the Church, and all *Chapels* lying in Common thereunto, are to be Repaired by the Joynt cost of the *Parishioners*; and such *Private Chapels* as wherein particular persons claim a propriety of *Seat* and *Sepulture*, are to be Repaired at their own charge; but the *Chancel* is to be kept in Repair at the *Parson's* cost: yet in all these respect is chiefly to be had to the *Custom* of the Place *time out of mind*, for that shall rule the *Premises*, and will go far to determine, whether the *Fences* of the *Church-yard* are to be made and repaired at the charge of the *Parson* (who may have the ground thereof as part of his *Glebe*) or at the charge of the *Parishioners*, or of such persons whose Land surrounds or abutts on the same. *Suarez* saies That for the better prevention of *Dilapidations*, there was Anciently a *Custom* in some places, That some part of the *Tithes* should not be paid to the Clerk,

or

Suarez de
Virg. & Statu
Religionis,
lib. 1. c. 28.
su. 18.

or applied to the party Beneficed, but should be reserved for the use of the Fabrick of the Church, to repair the same, and for the use of the Poor; and were not properly due to any particular Clerk, *ut in ejus dominium transferantur*, but to the Church; not the material Temple, but to the Church, that is, the Clergy for the use of the Temple. The Executours or Administratours of a *Dilapidatour* stand charged in the Ecclesiastical Court to the succeeding Incumbent to make good the Repairs; and if such *Dilapidatour* in his life-time shall make a Deed of Gift to defeat the Successour of the effect of his Suit, it is void, 13 *Eliz. cap. 10.* And the Successour Incumbent shall have like remedy in the Ecclesiastical Court against such Donee or Grantee, as he might have had against the *Dilapidatour's* Executour or Administratour. Also by 14 *Eliz. cap. 11.* it is provided, That all the Moneys received for *Dilapidations*, shall within Two years be employed upon the Buildings, for which they were paid, on pain of forfeit of so much to the King as shall not be so employed.

When a Church becomes *Litigious*, and doubt arises touching the Right of Patronage or Presentation, in that case the Law hath provided an Expedient for the Ordinary, whereby his being a Disturber, in case he Collate or Present, is prevented; to which end, and in such case the Law directs him to award the *Jure Patronatus*; wherein the Practice with us at this day answers to the pretence of all persons *quorum interest*, with more exactness and general satisfaction, than was anciently practicable according to the Canons and Constitutions of old, as appears by the defect (in this matter) of the Seventeenth Canon of the Council at Rome, *An. 1180.* which is onely to this effect, *viz.* *If a question arise concerning Presentations of divers persons to one Church, or concerning the Gift of Patronage, if the aforesaid Question be not decided within the space of Three months, the Bishop shall place in the*

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Church

Church the person whom himself conceives most worthy. The Law takes notice of a twofold *Jus Patronatus*, the one *Civile*, the other *Canonicum*: The former is that which is introduced by the Civil Law, and refers to a Lord or Patron in respect of his Bondman made Free, and his Goods: the other, and which onely is here intended, is, That which is instituted by the Church in shew of gratitude to him who either Founded, Built, or Endowed some Church; for which reason the Bishops granted them a certain Right in such Churches, which is commonly called *Jus Patronatus*, and that by the Canon Law understood as *Honorificum*, *Utile* & *Onerosum*. *Honorificum*, in regard of that obsequious Respect due from the Parish to the Patron, specially in that the chiefest Seat in his Church is granted to him: *Onerosum*, in that the Patron may lawfully defend his Church, and prevent the Dilapidations both of the Church, and of what she is Endowed with according to the way and manner prescribed in *cap. Filiis* 16. q. 7. It is also called *Jus Utile*, because that if any time the Patron or any descending from him shall happen to fall into decay, in such case the said Church is more oblig'd to supply the necessities of him and his, than of any other Poor. *c. Quæcunque cum sequent.* For this reason also it is, and that others may be encouraged to the like Acts of Piety, the Church (as a Mark of special grace and favour) hath granted to such Patrons the *Jus Præsentandi*, or a Right to Present fit persons to the Benefice of such Churches. This Right or *Jus Patronatus* did not belong to Patrons anciently or *jure antiquo*, as appears by the Gloss in *cap. Piæ mentis*; yet most certain it is, That this Right of Patronage was *Jus antiquissimum*, as is evident by *cap. Quoniam de jure Patronat.* And the Lateran Council calls it *Potestatem, in qua Ecclesia huc usque Patronos sustinuit.*

The present Incumbents, Parsons and Vicars, of *Parsons and Parsonage.* Churches burnt in *London* by the late *Dreadfull Fire*, and by Act of Parliament not to be rebuilt, are by the said Act not deprived of the Tithes, or other profits formerly belonging to their respective Churches so long as they shall assist serving the Cure, and other Offices belonging to their duty in the Parish-Church, whereunto their respective Parishes shall be united and annexed by the said Act, according to the direction of the Ordinary, &c. Saving to the King's Majesty, his Heirs and Successours, the Tenth and First-Fruits of all such Parish-Churches as by force of the said Act are united and consolidated, &c. yet so, as that the said Parsons and Vicars are by the said Act indemnified from the payment of all First-Fruits, Tenth and Pensions due and which shall be due unto his Majesty, and from all dues to the Ordinary and Archdeacon, and all other dues whatsoever chargeable upon them respectively, until such time as they shall receive the Profits arising from the same, as formerly. And no Process to issue out of any Court whatsoever, against the persons aforesaid, for their Non-payment of First-Fruits, Tenth, Pensions, or any other the dues aforesaid, &c. The said Parsons are likewise by the said Act indemnified for not Reading the 39 Articles, or not doing other Things enjoined by Law, until such time as the said Churches be Re-edified: or made fit for Publick Worship. The said Parsons and Vicars are likewise impower'd to lett Leases of their Glebe Lands, with the consent of the Patron and Ordinary, for any Term not exceeding 40 years, and at such yearly Rents, without Fine, as can be obtain'd for the same: And that no Lapses incurred upon any Non-presentation in due time of any of the Patrons of the said Livings since the said Fire, shall any ways prejudice, or make void the Presentations that the said Patrons have since made, whereupon any incumbent is since Instituted and Inducted, any Law or Statute to the contrary in any wise notwithstanding. By the Third Canon of that great Assembly of 180 Bishops at *Rome*,

in the Church of *Constantiniana*, An. 1180. in the Twentieth year of Pope *Alexander* the Third, it was Ordained, That no man should be admitted to the Office of a Bishop under the age of Thirty years; nor that any should be admitted to be a Deacon, or Archdeacon, or to have the government of a Parish, untill he were of the full age of Five and twenty years.

Vicars, Vicarages, and Benefices.

The next Chapter speaks of *Vicars*, *Vicarages*, and *Benefices*; *Gervafius* a Monk of *Canterbury* in his Chronicle *de tempore H. 2.* (under whom a Synod was convened at *Westminster*, An. 1175. by *Richard* then Archbishop of *Canterbury*) acquaints us with an Ancient Canon made at that Synod, whereby Vicars are restrained from behaving themselves proudly against their Parsons, a piece of Spiritual Insolence not grown quite out of practice to this day: it is the Eleventh Canon, the words are, *Illud etiam de Vicariis, qui personis fide & juramento obligati sunt, duximus statuendum, quod si fide vel Sacramenti religione contempta Personatum sibi falso assumentes, contra Personas se erexerint, si super hoc in jure vel confessi vel convicti fuerint, de cætero in eodem Episcopatu ad Officii sui Executionem non admittantur.* In all Appropriations of Churches there ever was, and ought to be, an establishment of sufficient Maintenance for the Vicar and his Successours, *pro sustentatione sua congrua*, made by the Bishop of the Diocese, by and with the consent of such as to whom such Churches are Appropriated: And this, though for the most part consisting onely of the Minute Tithes, yet hath the denomination of a *Benefice*, or Ecclesiastical *Benefice*, as properly as any Rectory or Parsonage whatever; for they are *perpetual Vicars*, in whom the Vicarage or *Benefice*, is as in Fee, though not properly in *demesne* as in Fee, as Temporal Inheritances are; and therefore the word [*Beneficium*] with the Feudists and Canonists is the same as *Feodum* or *Fendum* with our Common Lawyers; yet sometimes it is opposed to that which we call *Allodium*, or what a man hath in his own Name, and in his own proper Right and absolutely,

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for that which is here understood by *Beneficium*, may be possess'd *nomine alieno*, & *certis sub Legibus*; which may not properly be said of *Allodium*, that being properly what a man doth possess *nomine proprio*, & *absolute*: An instance of this you have in the Grant made by King William Rufus to Anselme Archbishop of Canterbury; *Præcepit Rex, ut investiretur Anselmus omnibus ad Archiepiscopatum pertinentibus, atque ut Civitas Cantuariæ, quam Lanfrancus suo tempore in Beneficio à Rege tenebat, & Abbatia Sancti Albani, quam non solum Lanfrancus, sed & Antecessores ejus habuisse noscuntur, in Allodium Ecclesiæ Christi Cantuariensis pro redemptione animæ suæ perpetuo jure transfrent.* By the Ninth Canon of the Lateran Council under Pope Alexander, It is prohibited to grant or promise any Ecclesiastical Benefices before they are actually void; the reason of which Canon was, to prevent the desire of the death of the present Incumbent, by him who by such promise or grant had an expectation to succeed him in the Benefice.

In the next place follows the Chapter of *Advowsons*, *Advowsons.* which the Canon Law calls *Jus Patronatus*, being a power or right of Presenting one to be Instituted to a vacant Ecclesiastical Benefice; I say, *Vacant*, because if the Benefice be not then void, the Presentation will be void in Law; the reason is, because were it otherwise, occasion might thereby be given the Presented to desire or wish for the Incumbent's death. *cap. Nulla. de Concessi. Præbend.* And although, what we call *Advowson*, the Canon Law calls *Jus Patronatus*; yet every *Jus Patronatus* is not an *Advowson*, according to the Civil Law; for the *Jus Patronatus* hath a twofold acceptance in the Law; the one, That Right which Lords or Patrons have on their Bondmen made Free by Manumission, and so it is taken in *ff. de jur. Patron.* but this is not to our present purpose; the other, That Right of Presentation to an Ecclesiastical Benefice, which belongs to Patrons of Benefices and Churches, which in the Law is likewise called *Jus Advocationis*, as appears by *cap. Quia*.

Quia Clerici, de Jur. Patronat. And this is that *Advowson* here intended. This Right of *Advowsons* or *Jus Patronatus* the Law doth also distinguish into *Ecclesiastical* and *Laical*. Touching the *Ecclesiastical* vid. *Covarru. in qq. Pratt. c. 36. nu. 2.* which is so called, not because an *Ecclesiastick* doth enjoy or possess it (for so he may also possess a *Laick* Patronage;) but because it belongs to one for that he hath founded, built, or endowed the Church *Ex bonis Ecclesiasticis*, or by reason of some Rectory of a Church, or some Ecclesiastical Dignity: as when a Benefice is erected with money gotten *ex bonis Ecclesiasticis*; in that case he hath *Jus Patronatus Ecclesiastici*, or *Patronatum Ecclesiasticum*: And so it is, if one hath the *Advowson* or right of Presentation, because he is a Bishop, a Dean, or the like; this also is *Jus Patronatus Ecclesiastici*, so the Gloss, in *Clem. 2. de Jur. Patronat. & alii.* The other kind of *Advowsons* or *Jus Patronatus Laici* is so called, for that it belongs to one, because he hath either founded, built or endowed some Church, or erected some Benefice *Ex bonis Patrimonialibus.* *Lessius de Justic. & jure, cap. 34. de Benefic. Dub. 4.* In pursuance of that distinction it is, that the Canon Law determines in a different manner in respect of *Ecclesiastick* and *Laick* Patronages, touching the time limited for Presentation to a vacant Benefice; for (according to that Law) if the Patronage be *Laick*, the Patron is obliged to Present within Four months next after the Church becomes void: but if the Patronage be *Ecclesiastical*, then within Six. *cap. unico, de Jur. Patronat. in 6.*

Appropriations.

Concerning *Appropriations* of Churches, the first thereof since the *Conquest* appears to be that of *Feverham* and *Middleton* in *Kent*, An. 1070. granted by *William the Conquerour* to the Abbey of *St. Austins* in *Canterbury* in manner following, *viz. In nomine, &c. Ego Willielmus, &c. ex his quæ omnipotens Deus sua gratia mihi largiri est dignatus, quædam concedo Ecclesiæ S. Augustini Anglorum Apostoli, &c. pro salute Animæ meæ & Parentum meorum, Prædecessorum, & Succes-*

Successorum, hæreditario jure hæc sunt Ecclesiæ & Decimæ duarum Mansionum, viz. Feversham & Middleton ex omnibus redditibus qui, &c. & omnibus ibidem appendentibus, terra, sylva, pratis, & aqua, &c. Hæc omnia ex integro concedo S. Augustino, & Abbati, & Fratribus, ut habeant, & teneant, possideant in perpetuum; which was afterward Confirmed by Pope Alexander the Third, and Ratified by Theobald Archbishop of Canterbury, together with an Establishment and Ordination of a Vicarage by the said Archiepiscopal Authority in each of the said Churches respectively. The like you have for the Appropriating of Three other Churches to the same Abbey, viz. of Wyvelsberg, Stone, and Brocland in Kent, by the Charter of Ed. 3. above Three hundred years since, Confirmed by Pope Clement's Bull, and ratified by Simon Mepham then Archbishop of Canterbury, with his Establishment of three perpetual Vicarages to the said Churches: Which Charter is to this effect, viz. Nos de gratia nostra speciali, & pro C. Libris, quas præfati Abbas & Conventus nobis solvent, &c. Concessimus & Licentiam dedimus pro Nobis & hæredibus nostris, quantum in Nobis est, ejusdem Abbati & Conventui, quod ipsi Ecclesias prædictas Appropiare, & eas sic Appropriatas in proprios usus tenere possint sibi & Successoribus suis in perpetuum (nisi in hoc, Quod Nos tempore vacationis Abbatiae prædictæ, si contigerit Ecclesias prædictas, vel aliquam earundem tunc vacare, Nos Jus Præsentandi ad easdem amitteremus) sine occasione, vel impedimento Nostri, vel hæredum nostrorum quoruncunque. Hujus Data est sub An. Do. 1349. The Modern Church-Historian of Britain in his Eleventh Book, pag. 136. calls to remembrance, That about An. 1626. there were certain Feoffees, a whole dozen of them though not incorporated by the King's Letters Patents, or any Act of Parliament, yet) Legally (he says) settled in Trust to purchase in Improvements, and that it was incredible (how then possible to be believ'd?) what large Sums were advanced in a short time towards that work: But then withall

Vid. G. Thorne in his Chronicle De Reb. gestis Abbatum S. Augustini Cant.

withall tells us somewhat that is *Credible*, viz. That there are 9284 Parochial Churches in *England*, endowed with Glebe and Tithes; but of these (when the said *Feoffees* entred on their work) 3845 were either *Appropriated* to Bishops, Cathedrals, and Colleges, or *Impropriated* (as Lay-Fees) to Private persons, as formerly belonging to *Abbeys*. The Redeeming and *Restoring* (he does not mean to the *Abbeys*) was the design of these *Feoffees*, as to those in the hands of Private persons, but *re infecta*, the Design proved abortive.

Commendams. A *Commendam* or *Ecclesia Commendata*, so called in contradistinction to *Ecclesia Titulata*, is that Church, which for the Custodial charge and government thereof, is by a revocable Collation concredited with some Ecclesiastical person, in the nature of a Trustee, *vel tanquam Fidei Commissarius*, and that for the most part onely for some certain time, *absque titulo*; for he that is *Titularly* Endowed, hath the possession of the Church in his own Name and in his own proper Right during his life; hence it is, that in the Canon Law a Church collated in *Commendam*, and a Church bestowed in *Titulum*: are ever opposed as contraries. *vid. Hist. Concil. Trident. lib. 6. pag. 600. & Duaren. de Benefic. lib. 5. cap. 7.* Thus King *Edgar* Collated *Dunstan* Bishop of *Worcester* to the Bishoprick of *London* by way of *Commendam*; *Rex Edgarus* (says *Radulph. de Diceto* in his *Abbrevia. Chronicorum*) *Lundoniensem Ecclesiam proprio Pastore viduatam commisit regendam Dunstano Wigornensi Episcopo. Et sic Dunstanus Lundoniensem Ecclesiam Commendatam habuit, & non Titulatam. dict. Radulph. de An. 962.* It is supposed that the first Patent of a *Commendam* *retinere* granted in *England* by the King to any Bishop Elect, was that which King *Henry the Third* by the advice of his Council (in imitation of the Popes *Commendams* then grown very common) granted by his Letters Patents to *Wengham* then Chancellour of *England*, notwithstanding his insufficiency in the knowledge of Divinity, to hold and retain all his former Ecclesiastical

cal Dignities and Benefices, whereof the King was Patron, together with his Bishoprick (he then succeeded *Fulco* Bishop of *London*) for so long time as the Pope should please to grant him a Dispensation: whose Dispensation alone would not bar the King to Present to those Dignities and Benefices, being all void in Law by making him a Bishop. He had also the like Patent of *Commendam retinere* as to his Benefices and Ecclesiastical Preferments in *Ireland*. And this Patent of such a *Commendam* being made by the King, his Lords and Judges, is for that reason the more remarkable, *vid. Le Hist. of the Church of Great Britain, pag. 84.* According to the proper and Ancient Account, *Commendams* were originally introduced in favour and for advantage of the Church which is *Commended, in favorem & utilitatem Ecclesiæ quæ Commendatur.* *Imola in ca. Nemo. de Elect. in 6.* says, that *Commendams* are not to be *Nisi ex evidenti Ecclesiæ Commendatæ necessitate vel utilitate.* The distinction of *Temporal* and *Perpetual Commendams* in the Canon Law is of no great use with us; indeed in the Church of *Rome*, according to the former mode of *Commendams*, a vacant Church is *Commended* either by the Authority of the Pope, if it be a *Cathedral*; *ca. penult. & ult. 21. q. 1.* or by the Authority of the Bishop, if it be a Church *Parochial*. This is commonly *Temporal*, or for Six months, and is in *utilitatem Ecclesiæ*: the other commonly *Perpetual*, and are *magis in subventionem eorum; quibus commendantur, quam ipsarum Ecclesiarum.* And a *Commendatary* for life is the same in reality with the *Titular*. These *Commendams* in their Original were Instituted to a good purpose, but after used to an evil end: For when by reason of Wars, Pestilence, or the like, the Election or Provision could not be made so soon as otherwise it might, the Superiour did Recommend the vacant Church to some honest and worthy person to govern it, besides the Care of his own, untill a *Restour* were provided; who then had nothing to do with the Revenues, but to govern them and consign them to another. But in process of

time these *Commendatories*, under pretence of Necessity, made use of the Fruits, and to enjoy them the longer, sought means to hinder the Provision: for remedy whereof, order was taken that the *Commenda* should not continue longer than Six months: But the Popes by the plenitude of their Power, did exceed these Limits, and *Commended* for a longer time and at last for the life of the *Commendatary*, giving him power to use the Fruits.

Lapse.

When any Ecclesiastical Benefices happen to be void, the Law provides that they shall be seasonably supplied with meet Incumbents, and will not by any means admit any long Vacancy, and hath therefore set a competent time within which he that hath the original right of Presentation in him, shall discharge his duty therein, or the *Lapse* shall incurr to him or them to whom by Law *ab Inferiori ad Superiorem* it gradually devolves. This matter of *Lapse* (in the intent and purpose thereof, though not by that denomination) is very Ancient: By the Ninth Canon of the Council of *Lateran* under Pope *Alexander*, it is provided, That *Cum Prehendas, Ecclesias, seu qualibet officia in aliqua Ecclesia vacare contigerit, vel si etiam modo vacant, non diu maneant in suspenso, sed in Sex menses personis quæ digne Administrare valeant conferantur. Si autem Episcopus, ubi ad eum spectaverit, conferre distulerit, per Capitulum ordinetur. Quod si ad Capitulum Electio pertinuerit, & infra præscriptum terminum hoc non fecerit, Episcopus exequatur. Aut si forte omnes neglexerint, Metropolitani de ipsis absque illorum contradictione disponat.* vid. *Chron. Gervasii de Temp. H. 2.* And by the Eighth Canon or Constitution of the Council at *Rome* in the year 1180. under Pope *Alexander the Third*, it was Ordained, That no Ecclesiastical Office should be promised to any man before it became vacant by the decease of the Possessor. For (says the Canon) it is an unrighteous thing to put any man in expectation of another mans Living, whereby he may wish his Brothers death. And when any place shall happen to be vacant, let it be planted

planted again within Six months, or else he who hath the Right of Plantation shall lose it at that time, and the Chapter, or Metropolitan Bishop shall have power to provide the vacant place. According to the Canon Law the Lay-Patron hath but Four months to present to a Benefice, but an Ecclesiastical Patron hath Six. *Patronatus vero Laicus intra quatuor menses præsentare potest, Ecclesiasticus autem Patronus intra Sex menses. c. uno, de jure Patron. in 6.* But the Pope is not limited to any time, so that he may Collate to such Ecclesiastical vacant Benefice at what time he pleases. *Papæ vero non est aliquod tempus præfixum, cum non habet Superiorem, qui possit ejus negligentiam supplere. c. aliorum 9. q. 3. nisi in c. Statutum, de Præb. in 6.* Although regularly all inferior Dignities Ecclesiastical and Benefices ought to be bestowed within Six months of their Vacancy, according to the rule of the Canon Law, *c. cum nostris, c. dilectus, & c. postulatis.* Yet the greater Dignities are by that Law to be conferr'd within Three months, *Majores vero Dignitates, ut Episcopales, debent intra tres menses tribui. c. ne pro defectu, de Elect. c. postquam, 50. Dist.*

Although in strictness and propriety of Speech, *Præsentation* refers to the Lay-Patron, and *Collation* to the Bishop, yet in the Canon Law the words *Collation* and *Collatour* are frequently used in a sense promiscuously relating to them both. Therefore you have it in one place said, That *Præsentatio à Fundatore fieri solet, Episcopo, vel alteri Collatori, & Episcopus instituit Præsentatum à Patrono. Rub. & per tot. tit. de Instit. & c. quod autem, de jur. Patron.* In another Place it is said, That *Præsentatio large dicitur Collatio. Rebuff. in Prax. Benefic. Reg. de infirm. Benefic. resignant, gloss. 14. nu. 6. post Barba. in c. Abbatem de Rescript. col. pen.* Yea, and sometimes Collation is generally taken also for Institution; *per tex. in ea. uno. ut Ecclesiast. Benefic. sine diminut. conferant.* Although a Lay-man doth found, build, or endow a Church, yet the Canon Law allows him not the Privilege of *Jus Patronatus*

Patronatus or *Jus Præsentandi* otherwise than *ex gratia*; for the *Canonists* do hold, That *de rigore juris non potest Laicus Ecclesiastica tractare negotia*. 2: *de Judic.* onely (say they) the Popes to encourage them in the founding, building, or endowing of Churches, have reserved that Privilege for them, and confirmed it by a Law. — *c. Decernimus* 16: q. 7: & *per tot. tit. de jur. Patronat.* As the *Jus Patronatus*, so *Presentation* also by the *Canon Law* is twofold, the one by an *Ecclesiastical Patron*, the other by a *Lay Patron*: This distinction is best known onely to the *Canon Law*, and although it may be so in *Presentation*, yet it is not properly applicable to *Collation*. The *Ecclesiastical Patron* (as aforesaid) hath by that Law Six months, to be computed from the day of his having Notice of the Vacancy to Present. *c. unic. de jur. Patronat.* 6. *Do. de Rota. Decis.* 568. *tit. de Sent.* & *re jud. Decis.* 31. & 845. *tit. de filiis Presb. decis.* 4. By the *Ecclesiastical Patron* is meant or intended, that person who hath the *Jus Patronatus* in him *ratione Ecclesiæ seu Beneficii quod possidet. c. dilectus de Offic. Leg. c. cum dilectus, de jure Patron.* But the *Lay Patron*, who hath the *Jus Patronatus ratione sui patrimonii*, hath onely Four months (as aforesaid) *ad Præsentandum. d. c. uno.* yet in his *Presentation* he may *variare*, but that may not be more than *semel tantum, c. quod autem, de jure Patr.* and this *Cumulative, non autem ut à primo recedere omnino possit. c. cum autem, ubi Pan. ibid.* So likewise as to *Collation* that also is twofold by the same Law, *viz. Necessary* and *Voluntary* (a distinction of little use with us;) *Necessary*, which the *Collatour* is bound to make, as to one who hath a *Mandate* from the Superiour Power for the same, *c. tibi, & c. duobus. de Rescr. lib. 6.* The *Voluntary Collation*, being that which is free in him who hath power to make the same.

Examination
Admission.

The *Canon* positively requires, that *Examination* shall ever precede *Ordination*, *Admission*, *Institution*, and *Induction*; and although this be *Incumbent* on the *Bishop* or *Ordinary* (when it is in order to a *Benefice*) before the

the Six months expire ; yet no obligation lies upon him to effect it, so soon as the party offers his submission to an Examination, specially if at the same time the Ordinary be *circa curam Pastoralem*. This Examination refers to the due qualification of the person to be Ordained or Beneficed, as to his *Ability* and *Conversation*. After this Examination, and thereon the Ordinary's Approbation, the way is open for Admission, if no other Legal Impediment appears to the Ordinary ; yet the Canon requires, that notwithstanding the Bishop's Approbation upon the party's Examination, he may not Ordain him, unless he hath *in esse* or *posse*, a promise or a prospect of some Ecclesiastical Living, whereof to assume the Cure, and whereon to receive subsistence, unless the Ordinary will maintain him untill he be so provided, in case he hath not of his own wherewith to subsist without such provision ; for our Law and Practice both requires, that they should be *Incumbents*, and not *Mendicants*. By the Fifth Canon or Constitution made by that great Convention of no less than One hundred and Eighty Bishops at Rome, under Pope Alexander the Third, it was Ordained, That if any Bishop should Admit any man to be a Presbyter or a Deacon, without the Title of a Place that may afford unto him things necessary for the maintenance of his life : Let the Bishop himself sustain him, untill he provide a Living for him, except he be able of his own patrimony to sustain himself. In the Council of Carthage it was Ordained, *Quod nullus ordinetur Clericus, nisi probatus, aut examine Episcoporum, aut populari testimonio. cap. Nullus 24 dist.* And by the Council of Pope Martinus it was Decreed, That all such as were Ordained Presbyters or Deacons without Examination, were to be expelled the Clergy. c. *fi. 24. Dist.* The Subject-matter whereon they are to be Examined differs with us from that used in the Church of Rome chiefly in these Three particulars, viz. *Quoad Genus : quoad Patriam : quoad Fidem. vid. c. quando 24. Dist.* There are several ancient Canons which give this *Jus Examinationis* to Archdeacons, c.

adhuc

see p. 13.

adhæc, & c. ut nostrum, De Offic. Arch. c. si quis 94. Dist. yet Rebuffus tells us, that at this day in France they have lost that part of their Office by a kind of desuetude or disuse thereof, it now wholly belonging to the Episcopal order in that Kingdom, as in this and most other Churches of Christendom. c. Si servus, 54. Dist. c. accepimus de ætate & qualitate.

Avoidance.

Vacatio Beneficii, or the Avoidance of an Ecclesiastical Benefice, which you meet with also in the ensuing Abridgment, as it is opposed to *Plenarty*, is the want of a lawfull *Incumbent*; during which *vacancy* the Law looks on the Church *quasi viduata*, without her Spiritual husband, and our Common Law on the Possessions thereof as in *abeyance*. An *Avoidance* in the causes thereof, as practicable with us, differs much from that at the Canon Law, where there are thrice as many as are in use with us. *Rebuffus* enumerates above Thirty Causes of such *Avoidances*, but of such relation to the Pontifical Constitutions, that not above a Third part of them takes place in this Realm. It is *Quæstio juris*, whether a Benefice be *void* before Sentence Judicially pronounced, albeit in the Law it be said, *Quod ipso facto sit privatus*? Admitting the Crime to be committed for which the Law says he shall be deprived *ipso facto*; yet the Question is held in the Negative, unless it plainly appears that the mind of the Legislators were otherwise, as if those words were added, *viz. Beneficium eo ipso vacare, ita ut alteri Libere possit conferri. c. Dudum 2. de Elect.* As when one takes a second Benefice Incompatible. *Aquin. 2. 2. q. 62. art. 3. Cajetan. ib. Sotus lib. 1. de Just. q. 6. art. 7. Covar. de Matrim. p. 2. cap. 6. §. 8. nu. 9, & 13. and generally the Modern DD.* But the Question is put a little farther, As whether the Benefice be *void* when it is said in the Law, *Sit privatus ipso facto absque alia declaratione*? *Covarrubias, Sotus, and Henriquez de Excom. c. 56. and many other of the later Writers are of Opinion, that it is not void, but that a declaratory Sentence of the Crime is requisite; and that Clause, absque alia declaratione, is to be understood of a declaration of the penalty*

Rebuff. Prax. Benef. de Regia ad Prælat. nominat. fac. §. Monast.

penalty incurred, not of the Crime committed; which exposition of the words, though it may seem somewhat strained, is notwithstanding by the frequent use and practice thereof among the *Canonists* sufficiently confirmed. And those Laws which say, that the Benefice shall be *void ipso jure*, as in *Extrav. Ambitiosæ, De reb. Eccl.* do not seem to be taken in that strict and rigorous sense, *Ut sponte teneatur se Reus spoliare. Less. de Just. & Jur. lib. 2. cap. 29. de Judice. Dub. 8. nu. 68.* If it shall hence be demanded, of what force, energy, or operation then are such Laws, whereby a man is *ipso jure* deprived of his Benefice, by reason either of some Crime committed, or another Benefice Incompatible accepted? the Answer which the *Canonists* make to it is, That by the words (*ipso jure privatus Beneficio*) the Offender doth immediately lose the very Title he had to the Benefice, insomuch as that he is no longer *Dominus Beneficii*, yet doth retain the possession thereof, of which he cannot be Deprived, *Nisi causa cognita*, without a fair Trial at Law. *Gloss. in c. Licet Episcopus, 28 de Præbendis in 6. & DD. ibi.* Note, This is not said by way of interpretation of these words (*ipso jure*) in any Statute Law of this Realm, but by way of Exposition thereof among the *Canonists*.

Although the *Clergy* have ever been had in the highest repute both with Prince and People; where the Gospel hath been received, and have been honoured with divers Privileges and Immunities above the Laity, yet the Law hath ever held it as prejudicial to the Church, That *Plures honores Ecclesiastici uni personæ sint tribuendi*. At a Council conven'd at *Westminster* in the Five and twentieth year of the Reign of *H. 1.* being above Five hundred years since, *Honorius 2.* then Pope, in this Synod it was Ordained in these words, *Præcipimus ne uni personæ in Ecclesia Archidiaconatus, aut diversis tribuantur honores*. To this purpose is the Third Canon of the *Lateran Council* under Pope *Alexander*, *Quia nonnulli diversas Ecclesiasticas Dignitates, & plures Ecclesias Parochiales contra Sacrorum Canonum instituta*

instituta nituntur adquirere, ita ut cum unum Officium vix implere sufficiant, stipendia sibi vindicent plurimorum, ne id de cætero fiat, districtius inhibemus. Et quia tantum quorundam processit ambitio, ut non duas vel tres, sed sex vel plures Ecclesias perhibeantur habere, nec duabus possunt debitam provisionem impendere: per Fratres & Coepiscopos nostros hoc emendari præcipimus. Likewise Gregory the Tenth, who succeeded Clement, at a Council at Lyons, *Pluralitatem Beneficiorum Curatorum damnavit.* Hen. de Knyghton. *de Event. Angl. lib. 2.* In like manner it appears by the Fourteenth Canon of the Council at Rome under Pope Alexander 3. An. 1180. That *Plurality of Benefices is there forbidden, as a vice smelling of Avarice and Ambition dangerous and prejudicial to the People, whose Souls are neglected by such Pastours.* One of the chiefest Reasons, why the Law forbids *Pluralities*, is, because it enjoyns *Residence*, both which are inconsistent in the same *Incumbent.* Aquinas says, *That the having of Two Benefices is not intrinsically evil, or Malum in se, nor that it is altogether indifferent, but carries in it a species of Evil, yet so as that upon due Circumstances it may be capable of a qualified lawfulness.* Aquin. *quod. lib. 9. art. 15.* To the many inconveniencies, which the Law doth specifically observe to follow upon *Pluralities*, this may not impertinently be added, That thereby the pious Intention of Founders is frustrated. The Council of Trent hath these words of it, *Hæc Pluralitas est perversio totius Ordinis Ecclesiastici,* Concil. Trid. Sess. 24. cap. 17. Pope Alexander the Third said, *That Pluralitas Beneficiorum certum continet animarum periculum. c. Quia in tantum 7. de Præbend.* The Canonists speaking of this Subject in reference to *Dispensations*, to salve the matter if possible, and bring both ends together, have found out a very pritty distinction of *Beneficia Incompatibilia primi generis*, and *Incompatibilia secundi generis.* But we are not concern'd in that Distinction. In that Council of Trent it was said by the Bishop of Bisonto, That *Plurality of Benefices*, unknown to the First

First Ages, was not brought in by the Court of Rome, but by Bishops and Princes, before the Popes took upon them to regulate the Matter of Benefices throughout all Christendom. Yet the Authour of the History of the said Council of Trent, lib. 2. says, That Clement the Seventh Commended to this Nephew Hippolitus, Cradinal de Medicis, in the year 1534. all the Benefices of the World, Secular and Regular Dignities and Parsonages, Simple and with Cure, being vacant for Six months, to begin from the first day of his possession, with power to convert all the Profits thereof to his own use.

The ways whereby an Ecclesiastical Benefice may be acquired, are not many; but the Causes for which an Ecclesiastical person may thereof be *Deprived*, are very many; generally they may all be reduced to these Three Heads, (1) By the Disposition of the Law: (2) By the Sentence of the Judge: or (3) By a free and voluntary Resignation, which though it be not properly a Deprivation, yet it is an amission of the Benefice. *Deprivation* by the disposition of the Law, is either by reason of some Crime, whereunto the penalty of *Deprivation ipso facto* is by the Law annexed, or by reason of accepting another Benefice Incompatible. The Pontifical Law adds Two more, which do not concern us, viz. Ingress into Religion, and Matrimony. The Crimes that incur *Deprivation* are many, but they must be proved, for the Beneficed party is not bound *sponte sua* to quit his Benefice *ante Sententiam Judicis*. *Less. de Benefic. cap. 29. Dub. 8.* And when a man is not *Jure Privatus*, but onely *Privandus*, in that case his Benefice cannot be bestowed on another, unless a Privative Sentence be first pronounced by the Judge. If a person Beneficed be long absent and Non-resident from his Benefice, the Benefice is not by reason of such long Absence void *ipso Jure*; but the Law in that case also requires a Judicial Sentence of *Deprivation*, and that onely *post trinæ Citationis in eorum Ecclesiis publice Edictum*. *Gloss. in c. Quoniam, ut lite non contestata. &c.*

Residence.

One of the chiefest Reasons in Law why Pluralities are prohibited, is for the prevention of *Non-residence*, as appears by the Third Canon of the *Lateran Council*; which Canon, after it prohibits the having of divers Ecclesiastical Dignities or more Parochial Churches than one, it makes provision against Non Residence in these words, *viz. Cum igitur vel Ecclesia, vel Ecclesiasticum Ministerium committi debuerit, talis ad hoc persona quæretur, quæ Residere in loco, & curam ejus per seipsum valeat exercere. Quod si aliter Actum fuerit, & qui receperit, quod contra Sacros Canones acceperit amittat; & qui dederit, largiendi potestate privetur.* Likewise by the Thirteenth Canon of that great Council of One hundred and Eighty Bishops, Assembled at Rome by Pope Alexander the Third in the year of our Lord 1180. it was Ordained, That such persons should be preferred to Ecclesiastical Dignities, as shall be actually resident with their people, and undertake the Cure of their Souls, by doing the work of their Ministry in their own persons, otherwise to deprive them of the Office and Benefice conferred on them; and they who do confer them without these Conditions, let them lose the right of conferring Offices and Benefices. By this appears how strict and exact the Law is against Non-Residence in the *Romish Church*.

Abbats and
Abbies.

One of the most Famous Abbats and Monasteries in Britain anciently, seems to be that of *Bangor* in *Flintshire*, whereof *Ranulphus Cestrensis* says, that *Tradunt nonnulli Pelagium fuisse Abbatem apud Famosum illud Monasterium de Bangor* (a). This Monastery which *Ranulphus* speaks of, is by our *Beda* called *Bamorna-tyrig* *lingua Anglorum*, in quo (says he) *tantus fertur fuisse numerus Monachorum, ut cum in Septem portiones esset cum Præpositis sibi Rectoribus Monasterium divisum, nulla harum portio minus quam Trecentos homines haberet, qui omnes de labore manuum suarum vivere solebant* (b). But concerning Abbats, having nothing to do with them, nor they with us, it being also well known what once they were in this Kingdom, and

(a) Cestrenf.
Polychron.
l. 4. c. 31.

(b) Bed. Eccl.
Hist. l. 2. c. 2.

and what now they are where the Pope doth exercise his Jurisdiction, it may here suffice onely to observe, That the word [*Abbates*] hath anciently had a wide and far different signification from what we now commonly understand thereby; for in and among the Laws of King *Æthelstan*, we find the words [*quatuor Abbates*] to be taken (according to the *Glossographist* thereon) for *quatuor hebdomadas*: That Law directs how and in what manner the *Hundred Court* shall be held; the words are, *Hoc est iudicium qualiter HUNDREDUM teneri debeat: In primis ut convenient semper ad quatuor ABBATES, & faciat omnis homo Rectum alii* (c). which the *Glossary* calls *Locum plane mendosum*, and by the *quatuor Abbates* will have *quatuor hebdomadas* to be understood; which is the more probable by what appears in one of the Laws of King *Edward*, Father of the said *Æthelstan*, who began his Reign in *An. 901.* being the Son of King *Alured*, the words of which Law are, *Volo ut omnis præpositus habeat GEMOTUM semper ad QUATUOR EBDOMODAS, & efficiat ut omnis homo rectum habeat, & omne placitum capiat terminum quando perveniat ad finem* (d). By the word [*Gemotum*] in that place is meant *Conventus Publicus, Concilium*, but chiefly *Placitum*, as appears by the 107th Law of King *Kanute*, made for the indemnity of such as should have recourse to Tribunals, for their safe coming and going to and from Courts of Justice, *Et volo ut omnis homo pacem habeat eundo ad gemotum, vel rediens de gemoto, id est, placito, nisi sit fur probatus.* It is a word from the *Saxan gemettan, convenire, unde Nostratium, to meet.* But this digression the Reader must put on the *Abbats* score, in regard the word [*Abbates*] gave the occasion thereof; which may be but a Venial offence, in regard that that Ecclesiastical Dignity is with us laid aside, though their Possessions had better Fortune; yet when King *H. 8.* did dissolve them, he did not onely augment the number of Colleges out of the Revenues thereof, but also erected divers new Bishopricks, as at *Westminster, Oxford, Perenbo-*

(c) Hist. Angl. Scrip. Antiq. col. 847.

(d) Ibid. col. 837.

Quam varia sint gemotorum genera vid. Equit. Doct. in suo Glossario.

rough, Bristol, Chester, and Gloucester; all remaining at this day save that at *Westminster*, which being restored to its pristine Institution by Queen *Mary* and *Benedictines* placed therein, was after by Queen *Elizabeth* converted to a Collegiate Church. In this Chapter there is mention also made of *Chauuntries*, *Cantaria*, or if you please, *Ædes Sacra: ideo Instituta & Dotata Prædii, ut missa ibidem Cantaretur pro anima Fundatoris & propinquorum ejus. Ita Spelm.* Of these and Free Chapels about 2374. were dissolved by King *H. 8.* to whom they were given by Parliament in the 38th. year of his Reign: The Religious Houses under 200 *l. per An.* were granted to him in *An. 1535.* All greater Monasteries in *An. 1538.* The Chantery and Free Chapels in *An. 1545.* Of these Chanteries Forty seven belonged unto *St. Pauls, London.*

*Annates or
First-Fruits.*

And as for *Annates* or *First Fruits*, it is Historically reported to us, that they were first introduced into *England* in the time of King *Edward* the First by Pope *Clement*, who succeeded *Benedict*. For this Pope *Clement* after the death of Pope *Benedict*, was no sooner Elected and Enthron'd in *France*, but he began to exercise his new Rapines here in *England*, by a compliance with the said King *Edward*, in granting him a Two years *Disme* from his Clergy for his own use, though pretended for the aid of the *Holy Land*, that with the more ease himself might exact the First-Fruits of vacant Ecclesiastical Benefices to augment his own Revenues, though not within his own Territories. This is said to be the first President of any Popes reserving or exacting *Annates* or *First-Fruits* of all Ecclesiastical Dignities and Benefices throughout *England*, extant in our Histories: which, though reserved but for Two years by the Pope at first, yet afterwards grew into a Custome by degrees, both in *England* and elsewhere. And thus they remained in the Pope untill an Act of Parliament entituled the Crown thereunto in the time of King *Henry* the Eighth, which afterwards were restored again to the Pope by Queen *Mary*; but in the first year of Queen
Elizabeth

Elizabeth an Act pass'd for restoring the Tenths and First-Fruits to the Crown. Notwithstanding what some Historians have (as aforesaid) reported touching the first introduction of *First-Fruits* into *England* by Pope *Clement* in the time of King *Edward* the First, it is most evident that they were to be yielded and paid here in *England* some hundred of years before that time, as appears by the Laws of *Ina* King of the *West-Saxons*, who began his Reign in the year 712. The Law was this, viz. *Primitias seminum quisque ex eo dato domicilio, in quo ipso Natali die Domini commoratur. Lambert. de Leg. Inæ Reg.* And by the Laws of King *Edgar*, who began his Reign in the year 959. it is Ordained in these words, *Ex omni quidem ingeniorum terra, ipsæ Seminum Primitiæ primariæ penduntur Ecclesiæ. Idem de Leg. Edgari Reg. Ipsas autem Seminum Primitias sub Festum Divi Martini reddito. Ibid.* The like you have in the Laws of King *Kanute*, who began his Reign in the year 1016. *Seminum Primitiæ ad Festum Divi Martini penduntur: si quis dare distulerit, eas Episcopo undecies præstato, ac Regi Ducenos, & viginti Solidos persolvito. Idem Lamb.* It is supposed, that *Boniface* Archbishop of *Canterbury* in the Reign of *Ed. 3.* was the first that made way for Popes to appropriate *Annates* and *First-Fruits* in this Kingdom to themselves; for the said Archbishop *An. 1246.* upon a feigned pretence, that his Church of *Canterbury* was involved in very great Debts by his Predecessour, but in truth by himself, to carry on Foreign Wars, and gratifie the Pope, procured from Pope *Innocent* a grant of the First years Fruits of all Benefices, that should fall void within his Diocese for the space of Seven years, till he should thence raise the Sum of Ten thousand Marks yearly out of the Bishoprick. So that this Grant of First-Fruits of Benefices to *Boniface* the said Archbishop, made way for Popes appropriating *First-Fruits* and *Annates* to themselves soon after. But in process of time the Parliament having (as aforesaid) settled them on King *Hz. 8.* there was an Office thereof established in *London, An. 1538.* whereby

Anon. Hist. of
the Church of
Great Britain.
p. 80.

whereby the King's Revenue increased exceedingly from this Office for the receipt of Tenth's and First-Fruits, which was then first erected in *London*; such Monies being formerly paid to the Pope, for that the Tenth's and First-Fruits of the *English* Clergy were yearly returned to *Rome*. But now the Pope being dead in *England*, the King was found his Heir at common Law, as to most of the Power and Profit he had usurped, and the Rents which the Clergy paid were now changed, together with their Landlord; for Commissioners (whereof the Bishop of the Diocese was ever one) were appointed to estimate their Annual Revenues, that so their Tenth's and First-Fruits might be proportioned accordingly. At this Time the Oblations from the Living, and *Obits* from the Dead, were as duly paid as Predial Tithes, and much advanced the Income: but Queen *Mary* did after by Act of Parliament exonerate the Clergy from all these First-Fruits, and ordered the payment of the Tenth's to Cardinal *Poole*, for discharge of Pensions allowed to certain Monks and Nuns; but Queen *Elizabeth* in the first year of her Reign resumed these First-Fruits and Tenth's, onely Parsonages not exceeding ten Marks, and Vicarages ten Pounds, were freed from First-Fruits. *vid. Stat. 1 Eliz. cap. 4.*

An *Obit* was at 40 s. in *St. Paul's* *London*; yet at *Waltham Abbey*, but at 2 s. 2 d. received by the *Churchwardens*.

Altarage.

That which in the method of the ensuing Treatise next offers it self to consideration, is *Altarage*; *Altaragium*, taking its denomination from the *Altar*, because (to speak properly) *Altaragium est Emolumentum Sacerdoti proveniens ratione Altaris, ex Oblationibus sc. vid. Jo. de Athon. in Constit. Legatim. Otho. c. Auditu ver. Proventus.* Touching this *Altarage*, there is an Ancient Record in the time of King *H. 3.* about the year 1234. in the Chronicle of *William Thorne* the *Augustine* Monk of *Canterbury*, whereof (among other things) there is mention made in a certain Composition between *Edmond* Archbishop of *Canterbury* and the Abbat of *St. Austins* in *Canterbury*, as to whom it may be paid, and to what value it may extend: The Composition runs thus, *viz. Noverint universi præsens Scriptum*

ptum inspecturi vel audituri, Quod cum inter Dominum Edmundum Dei gratia Cantuariensem Archiepiscopum totius Angliæ Primatem, Magistrum S. de Langeton, Archidiaconum Cantuariensem ex una parte, & dominum Robertum Abbatem & Conventum S. Augustini Cantuariæ ex altera, Controversia diutius mota fuisset super Ecclesia de Chistlet & Jurisdictione, &c. Item pro bono pacis concedunt Abbas & Conventus, quod Archidiaconus quando Visitationis exercet Officium, in Ecclesiis eorum sic ut in aliis Ecclesiis Dioecesis Cantuariensis recipiat Procuracionem consuetam, exceptis, &c. In Capellis vero de Menstre scil. Sancti. P. & Johannis, & Laurentii præsentabunt Domino Archiepiscopo idoneos Capellanos perpetuos ad Altaragia, ita tamen quod singula Altaragia valeant decem Marcas, qui hac portione tantum erunt contenti sub pœna amissionis dictæ portio-
nis, si coram Judice quocunque ex certa scientia plus aliquando petierint, præsertim cum Vicarius Matricis Ecclesiæ de Menstre, &c. Whereby it is very evident, That these Altarages issued out of the Offerings to the Altar, and were anciently payable to the Priesthood, as well as Tithes and other Oblations. It is most probable, that the greatest Annual Revenue by Altars if not by Altarages, in any one Church within this Realm, was in that of St. Pauls, London; for it seems when Chanteries were granted to King Henry the Eighth, whereof there were 47 belonging to St. Pauls, as aforesaid, there were in the same Church at that time no less than Fourteen severall Altars: And although they were but Chantery-Priests that Officiated at them, and had their Annual Salaries on that account, distinct from Altarages in the sense of Oblations aforesaid, yet in regard these Annual Profits accrued by their Service at the Altar, they may not improperly be termed Pension-Altarages, though not Oblation-Altarages.

Concerning Tithes, whether they are eo nomine due and payable now under the Gospel, is not to our purpose either to question or determine: it will be agreed on all hands, that the Law requires the payment thereof, and hath

Hist. Angl.
Scrip. Antiq.
col. 1882.
1883.

Full. ch. Hist.
lib. 6. p. 352.

Tithes.

hath stated it within the cognizance of the Ecclesiastical Jurisdiction. Historians of good credit and great Antiquity tell us, That *Æthelwolfe* King of the *West-Saxons* gave the Tenth part of his Kingdom unto God, whatever his design was by it, whether for the Redemption of his and his Ancestours Souls, or otherwise, yet it is now above 800 years since he Decimated *totius Regni sui Imperium*; An. 855. *Æthelwolphus Rex Decimam totius Regni sui partem ab omni Regali servitio & tributo liberavit, & in sempiterno graphio in Cruce Christi, &c. uni & trino Deo immolavit*, Simeon. Dunelm. *Hist. de Gest. Reg. Angl.* Likewise *Æthelstan*, who Reigned about 70 years after *Æthelwolfe*, in the first of all his Laws made special provision for the punctual payment of Tithes, *Ego Adelstanus Rex, &c. Mando Præpositis meis omnibus in regno meo, &c. ut in primis reddant de meo proprio Decimas Deo, tam in vivente captali quam mortuis frugibus terræ, & Episcopi mei similiter faciant de suo proprio, & Aldermanni mei & Præpositi mei. Et volo ut Episcopi & Præpositi hoc judicent omnibus, qui eis parere debent, &c. Recolendum quoque nobis est, quam terribiliter in Libris positum est, Si Decimam dare nolumus, ut auferantur à nobis Novem partes, & solummodo Decima relinquatur.* This *Æthelstan* dying without issue, was succeeded in the Kingdom by his brother *Edmund*, in the Second of whose Laws we find it thus Enacted, in a great Synod conven'd at *London*, where *Odo* and *Wolstan* Archbishops were present, *Decimas Præcipimus omni Christiano super Christianitatem suam dare, &c. Si quis hoc dare noluerit, Excommunicatus sit.* And in the First of King *Edgar's* Laws you have these words, *Reddatur omnis Decimatio ad Matrem Ecclesiam cui Parochia adjacet.* Also in the Fourth of King *Etheldred's* Laws it is commanded in these words, *Præcipimus ut omnis homo, &c. det rectam Decimam suam, sicut in diebus Antecessorum nostrorum fecit, quando melius fecit, hoc est, sicut aratrum peragrabat decimam acram. Et omnis Consuetudo reddatur ad Matrem nostram Ecclesiam cui adjacet.*

adjacet. Et nemo auferat Deo, quod ad Deum pertinet, & Prædecessores nostri concesserunt. And in the Ninth of King *Alured's* Laws, *Si quis Decimam contra teneat, reddat LASHLITE cum DACIS, WITAM cum ANGLIS.* And in the Laws of the Conquerour it is particularly Ordained, That *de omni annona Decima garba Deo debita est, & ideo reddenda. Si gregem Equarum habuerit, pullum reddat decimum; qui unam tamen vel duas habuerit, de singulis pullis Singulos denarios. Similiter, qui Vacas plures habuerit, decimum vitulum: qui unam vel duas, de Vitulis singulis Obolos singulos. Et qui Caseum fecerit, det Deo decimum; si vero non fecerit, Lac decima die. Similiter decimum Agnum, decimum Vellus, decimum Caseum, decimum Butyrum, decimum Porcellum. Item, de Apibus vero Similiter Commodi. Quinetiam de bosco, & prato, & aquis, de molendinis, parcis, vivariis, piscariis, virgultis, & hortis, & Negotiationibus, & de omnibus rebus quas dederit Deus, decima pars ei reddenda est, qui Novem partes simul cum Decem largitur. Qui eam detinuerint, per Justitiam Episcopi, & Regis, si necesse fuerit, ad redditionem arguantur.* It is on good ground that the Canonists do hold, That Tithes Originally and *ex sua natura* are of Ecclesiastical cognizance, beside the Statute of *primo R. 2.* That *persuit for Tithes ought, and of ancient time did pertain to the Spiritual Court, notwithstanding what others asserr, That in their own nature they are a Civil thing, and that (as Braët. lib. 5. fol. 401.) they were annexed to the Spirituality.*

In the Chapter of *Tithes* in this ensuing Abridgment you find the Order of *Cistercians*, so called from *Cistercium* in *Burgundy*, being but refined *Benedictines*, exempted from paying of *Tithes*: so also were the Orders of *Templers* and *Hospitallers*, otherwise called of *St. John's of Jerusalem*; for anciently the Lands of *Abbies* did pay *Tithes* to the Parish-Priest as well as the Lands of Lay-men, but in the year 1100 they obtained (besides the Appropriations they then had) of Pope

H

Paschal

Dacis pro Dani. Lash. lre, h. e. Multa quinque Marcarum: Wita, i. e. Mulcta 30. Solidorum. Secundum Glosar. Hist. Angl. Scriptores Decem.

Paschal the Second at the Council of *Mentz*, that their Lands for the future should be discharged thereof. But this Exemption was after limited and restrained by Pope

*P. Adrian 4.
was an Eng-
lish man, and
had been a Be-
nedictine
Monk of St.
Albans.

† Vld. Alex.
4. in 6. de dec.
c. 2. Statuto.
8. Innoc. 8. To.
2. p. 4. 10. E-
dit. Colon.

* *Adrian* the Fourth about the year 1150. (excepting the Tithes of new improvements in their own occupation by Culture, Pasture and Garden Fruits) † onely the said Three Orders were exempted from the general payment of all Tithes whatever. The *Templers* and *Hospitallers* were mere Laymen, yet they were exempted as well as the other: Yet the *Lateran* Council in An. 1215. Ordered, That this Privilege should not extend to Covents erected since that *Lateran* Council, nor to Lands since bestowed on the said Orders, though their Covents were erected before that Council. Inso-much that when the said *Cistercians*, contrary to the Canons of that Council, purchased Bulls from the Pope to discharge their Lands from Tithes: King *H. 4.* Null'd such Bulls by the Stat. of 2 *H. 4. cap. 4.* and reduced their Lands to a *Statu quo*. These Exemptions from payment of Tithes in this or that particular Religious Order, was not known in the World, when *Æthelwolph* Son of *Egbert*, whom he succeeded as King of the *West-Saxons*, gave (as aforesaid) Tithes of all his Kingdom, and that freed of all Tributes, Taxes, and Imposi-

*Vid. Ingulph.
8. Malmesb.
Gest. Reg. l.
2. cap. 2.

sitions as appears by his *Charter to that purpose; having at a Solemn Council held at *Winchester*, subjected the whole Kingdom of *England* to the payment of Tithes. True it is, that long before his time many Acts for Tithes may be produced, such as the Imperial Edicts, Canons of some Councils and Popes, beside such Laws as were made by King *Ina* and *Offa*; yet the said Edicts and Canons were never received in their full power into *England* by the consent of Prince and People, nor were King *Ina* and *Offa* (though Monarchs of *England*, as it were, in their turns) such Kings as conveyed their Crowns to the Issue of their Bodies, but the said *Æthelwolph* was *Monarcha Natus, non factus*; and although before his time there were Monarchs of the *Saxon Heptarchy*, yet not successive and fixed in a Fa-

a Family; but the said King *Egbert*, being the first that so obtained this Monarchy, as to leave it by descent unto his Son, the said *Æthelwolph*, he thereby had the more indisputable power to oblige all the Kingdom unto an observance of the said Act.

In the said Chapter of *Tithes* there is also mention made of *Mortuaries*, as having some relation to *Tithes*, wherein is shewed what it is, when, by and to whom, and wherefore to be paid. By the *Stat.* of 21 *H.* 8. they are reduced to another regulation, than what was in the time of King *Henry the Sixth*. A *Mortuary* was then the Second best Beast whereof the party died possessed; but in case he had but two in all, then none due. It was called a *Corse-Prezent*, because ever paid by the Executours, though not always bequeathed by the dying party. All persons possessed of an Estate, (Children under *Tuition*, and *Femes Covert*, but not *Widows*, excepted) were liable to the payment thereof to the *Priest* of that Parish, where the dying party received the Sacrament (not where he repaired to Prayers;) but in case his House at his death stood in two Parishes, it was then divided betwixt them both: And it was given in lieu of *Personal Tithes*, which the party in his life time had through ignorance or negligence not fully paid ——— *Lindw. Conf. de Consuetud.* Such of the ancient Lawyers as were unacquainted with this word *Mortuarium* in the aforesaid sense as we now use it, took *Mortuarium* onely *pro derelicto in morte*, and say of it, That it is *Vocabulum novum & barbarum*: but we understand it better, where of Custome it is due and payable. These *Mortuaries*, where by the Custome they are to be paid, were ever in consideration of the omission of *Personal Tithes* in the parties Life-time, which *Personal Tithes* were by the Canon Law to be paid onely of such as did receive the Sacraments, and onely to that Church where they did receive them, as may be inferr'd plainly from cap. *Ad Apostolicæ de Decimis*. But observe, says *Lefsius*, that in many places these *Personal Tithes* have been quite taken away, and in some places they are paid

only at the end of a man's Life, as among the Venetians, (which manner of payment seems to have a great resemblance to these Mortuaries;) and in some places they are paid only at the end of the year. And in like manner many Predial and Mixt Tithes in divers places are also abolish'd; which (says he) is for the most part done by the permission of the Church, where men have been observed to pay them with regret and much against their minds, nor hath the Church in such cases thought fit to compell them to it, on purpose to avoid scandal, Lessius de Just. & jur. lib. 2. cap. 39. Dub. 5. nu. 27. And in such places where the Custome is to pay a Personal Tithe, when any persons shall Hunt, Fish, or Fowl to make gain or Merchandize thereby, and it be neglected to be paid, whether Restitution or Compensation by way of a Mortuary (where Mortuaries are Customable) be in that case due by Law, is a Question, which by Covarruvies may be well held in the Affirmative.

Vid: Less. de
ma. acq. dom.
lib. 2. c. 5.
Dub. 7. nu.
38.

Beginns.

Although the face of the Church as well as State began to look with a purer (though less Sanguine) complexion, when Queen Elizabeth adorn'd the Crown, than when her Sister wore it, yet even in Queen Elizabeth's time there crept such abuses into the Church, that Archbishop Parker found it necessary to have recourse unto the Power given him by the Queens Commission, and by a Clause of the Act of Parliament, *For the uniformity of Common Prayer and Service in the Church*, &c. whereupon by the Queens consent, and the advice of some of the Bishops, he sets forth a certain Book of Orders to be diligently observed and executed by all persons whom it might concern; wherein it was Provided, That no Parson, Vicar, or Curate of any Church Exempt, should from thenceforth attempt to conjoyn, by solemnization of Matrimony, any, not being of his or their Parish-Church, without good Testimony of the Banns being ask'd in the several Churches where they dwell; or otherwise were sufficiently Licensed. Heyl. Hist. of Q. Eliz. An. Reg. 3. Banns or Banna, that word *Bannum* is some times taken *pro Mandato*, scil. *Edicto*; it is

is a word of divers significations, as appears almost by all the Glossographers and Feudists; it sounds sometimes like *Editum*, sometimes like *Mandatum* or *Decretum*, and sometimes (as here) like *Proclamatio*, *Saxonibus* gebann, whence there is their gebannian *pro Proclamare, edicere, mandare, ut & nostratum Bannes, pro Nuptiarum fœdere Publicato*. This Publication of *Banns* was cautiously ordain'd for the prevention of Clandestine Marriages, which were prohibited in this Kingdom above 500 years since, as a thing contrary in all Ages to the practice of all Nations and Churches where the Gospel was received; and therefore at a Council conven'd at *Westminster* in the year 1175. by *Richard* Archbishop of *Canterbury* under the Reign of King *H. 2.* it was Ordain'd, That no person whatsoever should solemnize Marriage in any clandestine manner, and in case any Parson should have a hand therein, he was to be suspended *ab Officio* for the space of Three years: *Nullus Fidelis cujuscunque Conditionis sit, occulte Nuptias faciat, sed à Sacerdote publice nubat in Domino. Si quis ergo Sacerdos aliquos occulte conjunxisse inventus fuerit, triennio ab Officio suspendatur. Can. 17. dist. Concil.* It is Recorded by good Historians, that Anciently in *Ireland* they were so far from Publishing these *Banns* before Marriage, that they rejected all Matrimonial Laws whatever, insomuch that Polygamy was very common amongst them until the Reign of King *H. 2.* who sent *Nicholaus* his Chaplain, and *Radulphus* Archdeacon of *Landaff* into *Ireland*, where at *Cassell* they held a great Council under Pope *Alexander*; in which Council Three things were specially Ordain'd, the one concerning *Baptism*, to be *In the Name of the Father, Son, &c.* for till then their Custome was to Dip the Child, as soon as it was born, three times in Water, but if it were a Rich man's Child, then in Milk: Another concerning *Tithes* to be duly paid to Ecclesiastical Persons, for till then many of them scarce knew whether *Tithes* ought to be paid or not: And the Third was concerning *Marriage*, that it should be solemnized *jure Ecclesiastico*,

Ecclesiastico, plerique enim (say the Historians) *illorum, quot uxores volebant tot habebant.* There was also a Fourth thing Decreed in that Council, and that was concerning *Testaments*, and distributions of the Goods and Chatel of persons deceased. — *Chron. Jo. Bromt. de Temp. H. 2.*

Adultery.

Within the cognizance of the Episcopal or Ecclesiastical Jurisdiction are also all matters relating to the sin of *Adultery*; the Bishops Jurisdiction herein is very Ancient, as appears by the Laws of King *Kanute*, made above 650 years since, in *Leg. 80. Si quis Sponsam & Concubinam simul habuerit, non faciat ei Presbyter aliquid reftitudinum, quæ Christiano fieri debent, priusquam pœniteat, & ita emendet sicut Episcopus injungit.* Such Adultery is a kind of double Fornication, according to the definition in the 75th of the same Laws, *Adulterium est, si Sponsus cum vacua fornicetur, & multo pejus si cum sponsa alterius.* It was a strange and most cruel punishment that *Philip* Earl of *Flanders*, in the time of King *H. 2.* caused to be executed on *Walter de Fontibus*, taken (as reported) in Adultery with the Countess *Isabella*: who commanded that he should be beaten to death with blows or strokes of Keys tyed up in bundles; and being dead, his Body to be hung by the Feet on a Fork with the Head downwards, in a place prepared for that purpose, there to remain ignominiously exposed to the view of all Spectatours. *Radulph de Diceto. Imag. Hist.*

In Spain it is lawfull for a man to kill his Wife or his Daughter, taken by him in Adultery.
Dr. Taylor.

The punishment of an Adulterers according to the foresaid Laws of King *Kanute* was much more favourable; for by the 78th of those Laws she was to lose but her Nose and her Ears, *Si Mulier, vivente Marito suo, faciat Adulterium, & manifestetur, &c. ipsa perdat Nasum & Aures.* But the Emperour *Aurelian* is said to have punished it in one of his Souldiers, for committing it with his Hostess, in a way of Cruelty little inferior to that practised by the said Earl of *Flanders*; for he commanded the heads of two Trees growing nigh together to be bowed down, the Souldiers Legs to be fast tied thereunto, then to be suddenly let go; whereby

whereby he was torn in two parts, the one hanging on the one Tree, the other on the other, and so to remain as a terrifying Spectacle to his Army. *Buc. Chron.* Notwithstanding what was first abovesaid in reference to what Jurisdiction the cognizance hereof did anciently belong in the days of King *Kanute*, viz. *That the Offender should make such satisfaction as the Bishops should enjoy*; yet it is evident that after this, viz. in the Conquerour's time, *Fornication* and *Adultery* were punishable in the King's Temporal Court, and the Leets especially (by the name of *Lecherwite*,) and the Fines of Offenders assayed to the King, though now it meerly belongs to the Church, a President whereof we have in the Church of *Corinth*, which by *St. Paul's* Command proceeded against the *Incestuous* person; but as to a *Rape*, there being force and violence in the case, the Temporal Court and Common Law (were there no Statute in the case) hath the best Right to the trial and punishment thereof. By the Conquerour's Laws the punishment of *Adultery* was onely pecuniary, *Leg. 14. Qui Desponsatam alteri vitiauerit, forisfaciat Weram suam Domino suo.* Yet in some cases it was Capital, according to the said Conquerour's Laws, as in *Leg. 37. Si Pater deprehenderit filiam in Adulterio in domo sua, seu in domo generi sui, bene licebit ei Oure (lege forsan Occidere) Adulterum.* *Lambert. de Priscis Angl. Legibus.*

Wera h.e. pretium Nativitatis hominis.

Forasmuch as *Bastards* and matters of *Bastardy* are within the cognizance of the Ecclesiastical Jurisdiction, some notice is taken thereof in the next place of this *Abridgment*. By *Bastard* we commonly understand *prolem ex illicito concubitu procreatam*. The most Famous of this kind that we meet with in History, and that concerns us, was *William the Conquerour*, of whom *Simeon Monachus Dunelmensis* in his History says, That *An. 1035. Obiit Robertus Dux Normandorum, cui successit Willielmus Bastard filius ejus in puerili etate.* Of whom also *Radulphus de Diceto* in his *Abbreviationibus Chronicorum* on the year 1036. says, That *Obiit*

Obiit ROBERTUS Dux NORMANNIÆ
 Frater Tertii RICHARDI, ab JEROSOLYMIS
 rediens, apud NICEAM Civitatem. Cui successit
 WILLIELMUS BASTARD filius ejus in pue-
 rili ætate, qui ANGLIAM postea conquirit; pater
 WILLIELMI Regis RUFII, & HENRICI.
 It is frequent in History to find William the Conquerour
 Sirnam'd the Bastard; nor did himself in the least dis-
 dain to style himself by that Addition; for in his Epistle
 to Alanus Earl of Britannia Minor, we find him thus
 styling himself, *Ego Willielmus cognomento Bastardus*.
 And no wonder (says the Glossographer on the said Histo-
 rians) when the Title or Name of Bastard in those days
 was used by some as a mark of Honour; the which he is
 the rather induced to believe, for that (*vocis derivationem*
Kilianam amplectens) scil. a *best-aerd*, that is, *optima*
indoles sive natura, there is no cause of being ashamed
 thereof: *Illegitimo enim* (says he) *& furtivo concubitu*
procreati, animo plerumque sunt alacri & elato, ingenio
sagaci, & judicio exacto: hanc (inquam) vocis origi-
nationem potius probarem, cum in cæteris nulla sit glo-
riandi causa. By the Canon Law a Bastard is prohi-
 bited from taking Orders, as also from having an Eccle-
 siastical Benefice. c. 1. & per tot. *De filiis Presbyt.* The
 said Prohibition is grounded by that Law on *Deut. 23.*
Non ingredietur Manzer, hoc est, de Scorto Natus, in
Ecclesiam Domini usque ad decimam generationem. Yet
 the Pope doth usually dispence with that Canon, spe-
 cially where such Illegitimates live commendably, and
 follow not the vicious practice of their Parents; *In illis*
qui paterna vitia non sequuntur, possunt suffragari vir-
tutes, quæ inducent Summum Pontificem ad Dispensan-
dum, si morum honestas eos Commendabiles reddat
c. Presbyterorum 56. Distin. And lest such should
 conceive themselves causlessly injured by that Prohibi-
 tion, the Canonists assign three Reasons for it; the one
 is the Dignity of the Clergy and the Sacraments, which
 ought not to be committed to Infamous persons: Ano-
 ther is in detestation of their Parents Crime, which
 com-

commonly extends also to their Children: The third is the Parents Incontinency, and because the Children do for the most part inherit their Parents Vices. — *cap. Si gens Angelorum.* 56. *Distin.* Yet a Modern Historian speaking of Pope *Leo* the Seventh, *An.* 935. says (out of *Luitprandus*) that *Bozon* Bishop of *Placentia*, *Theobald* of *Millain*, and another great Prelate, were all the Bastards of *Hugo* King of *Italy* by his three Queens *Bezola*, *Rosa*, and *Stephana*, whom he termed *Venus*, *Junio*, and *Semele.* *vid.* *Prideaux's Compend. Introduct. of Hist.* p. 106. *Edit.* 5.

Next follows the matter of *Divorce*, which is the separation of Married persons by force of the Sentence of an Ecclesiastical Judge qualified to pronounce the same. Adultery in either party is the common, though not the only cause of *Divorce*. Some there are (it seems) of great Reputation in the Church (for this is *Questio tam Theologiæ quam Juris*) who positively condemn it as unlawfull for a Man or Woman to live with their Husband or Wife respectively if either of them be notoriously guilty of Adultery. Of which Opinion was *St. Hierom*, saying, That a man is *Sub maledictione si Adulteram retineat.* And *St. Chrysostome*, *Fatuus & iniquus; qui retinet Meretricem; Patronus enim Turpitudinis est, qui celat Crimen uxoris.* So that it was none of *Cato's* wisdom, nor any great piece of kindness done his Friend *Hortensius*, to lend him his Wife *Martia*, whose Chastity deserv'd a better requital. *Socrates* also is reported to be as kind hearted in this matter, as ever *Cato* was; and they are both said to lend their Wives as freely as a man lends an Utensil: As these Wife men were beyond the reach of a *Divorce*, so they were more serious than to blush at Cornutism, the common Fate of such Philosophers. *St. Basil* was of Opinion, That it was lawfull for a Woman still to cohabit with an adulterous Husband; to which purpose he made a Canon, and commanded it to be done in his Church, as appears in his Epistle to *Amphilochius*, 1 *Can.* 9. & 21. This also was the Sentence of *St. Austin* to *Pollentius*,

Divorce.

In *Matth.* 19.
Caus. 32 q. 1.
c. *Sicut.*

and in his Book *de Adulterinis Conjugiis*. David received his Wife Michael, who had lived with another man. St. Basil it seems, though he be of opinion that the Woman should still live with the Adulterous Husband, yet does not think it fit, that the man should be so obliged as to his Adulterous Wife. The Council of *Eliberis* refused to give the Sacrament to a Clergy-man, that did not instantly expell from his House his Wife whom he knew to commit Adultery: And by the Council of *Neocaesarea* he was to be deposed from his Dignity in the same case. In the Council of *Trent* there was a Canon made, having an *Anathema* added to it, which condemned those that say, *That the Bond of Marriage is dissolved by Adultery, and that either of the parties may contract another Matrimony whilst the other liveth*: And by the Fifth *Anathematism* of that Council, 22 July 1563. were condemned Divorces allowed in *Justinian's Code*: which *Anathematism* was added at the instance of the Cardinal of *Lorain*, to oppose the Opinion of the *Calvinists*. In the same Council upon the Article of *Divorce*, it was said by one of the Fathers there, that the Matrimonial Conjunction was distinguish'd into three parts; the *Bond*, the *Cohabitation*, and the *Carnal Copulation*: inferring, that there were as many Separations also: and that the Ecclesiastical Prelate had power to separate the Married, or to give them a Divorce in respect of the Two latter, the *Matrimonial Bond* still standing sure, so that neither can marry again: Yet the Gospel admits but of one cause of Divorce, viz. *Fornication*, which should seem to be understood *de Vinculo*, because *Divorce* in the other respects may have many Causes.

Of all Personal Actions within the Ecclesiastical Cognizance, that of *Defamation* seems to be of the tenderest concern, if that be observed which *Solomon* says, *That a Good Name is to be chosen before great Riches*; where by *Name*, nothing can be understood other than a man's Credit, Fame, and Reputation in the World: So that the Inference is clear, a *Defamer* is the worst of Thieves,

Vld. Dr. Taylor
Cases of
Consc. lib. 1.
c. 5. nu. 9.

Trent. Concil.
lib. 8. 1563.

Father Soto.

Concil. Trent.
lib. 7.

Defamation.

Prov. 22. 1.

Thieves, the Sacrilegious ones excepted; yet were it not for the sweetness of Revenge, and the encouragement of the Law, such Actions might be better spar'd than what it costs to maintain them; and such ill-scented Suits do favour worse being kept alive in a Tribunal, than they would by being buried in Oblivion, specially if the Defamed considered, that to forget Injuries is the best use we can make of a bad Memory. This Defamation is not properly that, which we call Detractio, for Detractio in its proper signification is alienæ famæ occulta & injusta violatio; but Defamation, though it be an unjust, yet it is not an occult violation of another man's Fame or Reputation; they have indeed both the same end, but they do not both take the same way to that end: they both aim and design the extinguishing or diminishing the Credit and Repute which one man hath in the mind and good opinion of another; but the one doth it more openly and publickly, at least not in so clandestine way as the other. This Defamatio is of near affinity to that which we call Contumelia, which is an unlawfull violation of a persons Honour and Reputation by undecent and False Speeches, Gestures, or Actions, on purpose to disgrace him: only in this also they differ, that Defamatio may be of one man to another in the absence of the Defamed; but Contumelia is not but to the party present, vel absenti tanquam præsenti, that is, in the presence of such as have a relative representation of the person Contumeliously so reproached. Touching Actions of Defamation there are two Questions raised, rather by the Casuists than Canonists; the one, Whether the Heirs of the Defamer be obliged to make restitution of Damage to the Defamed, in case the Defamer died before satisfaction made? the other, Whether satisfaction for the damage done by Defamation, be to be made to the Heirs of the Defamed, in case he died before such damages were recovered by him? Although both these Questions are answered in the Negative by that known Rule in Law, Actio personalis moritur cum persona;

the Reason being, because the Obligation arising thence is meerly Personal, & *non est ad aliquid dandum, sed ad aliquid agendum*; yet Navar. Adrian. and others, who hold the contrary, will not be so answered; for though they agree the Rule of Law, yet they deny the foresaid reason of that Rule to hold in this case, for (say they) the obligation in this case is not purely and meerly Personal, as is commonly supposed, but doth *quodammodo* affect the Estate of the Defamer, whether alive or dead: He gives an Instance, *A man sets his Neighbours House on fire, and dies; his Heirs shall make good the damage done by that fire: A mans good Name and Reputation is far more pretious than his habitation: he that consumes that Good Name and Credit without cause, shall refund the damage out of his Estate, and death it self (before satisfaction made) shall not excuse his Heirs.* vid. Navarr. c. 18. nu. 45. & Adrian quodlibet 11. So likewise as to the other Question, *Utrum defuncto sit Fama restituenda?* there are who hold it in the Affirmative, *Quia Fama est bonum, quod homo etiam post mortem censetur possidere.* But when all is said (for some will superabound in their own Judgments) the said Rule of Law must stand void of all Exceptions, and hold good and applicable to the Premises, That *Actio Personalis moritur cum persona.*

Sacrilege.

An. 694.

Ex MS. in
Colleg. C. C.
Ant. Chron.
W. Thorn.

Among all those horrid Offences whereby the Church is or can be violated, that of *Sacrilege* seems to look with the blackest face; which, though as a Felonious act; may fall under a Temporal cognizance, yet the Canon Law concludes it as a thing in its own nature properly subjected to the determination of the Ecclesiastical Jurisdiction. It is now nigh a Thousand years since *Withred* King of *Kent* conven'd a Synod, wherein *Birhwal* Archbishop and Primate of all *Britain* was President: In which Synod it was so long since declared in these words, *viz. Horrendum est hominibus Deum vivum expoliare, tunicamque ejus & hereditatem scindere.* By the Laws of *Alured* King of the *West-Saxons*, Leg. 7. the Sacrilegious person was to lose that hand where-

wherewith he did the Fact, *Si quis in Ecclesia furetur aliquid, amputetur manus de qua furatus est.* In the time of Queen *Elizabeth* there was a Sacrilegious kind of Church-Plunderers, who under pretence of abolishing Superstition, demolished ancient Tombs, raz'd the Epitaphs and Coat-Armours of most Noble Families, and other Monuments of venerable Antiquity, took the Bells out of Churches, and uncovered the Roofs of Churches by plucking off the Lead; but these Birds of Prey had their Wings soon clip'd by the said Queens Proclamation, which was effectually put in Execution for the restraint of such Sacrilegious Rapines: King *Guthred*, who by St. *Cuthbert's* Command was in Childhood taken out of a Servile estate and made King of *Northumberland* about the year 890. made such an Edict against the Sacrilegious persons as thunder'd them all into Hell, *Gravissimæ maledictionis Anathemate percussit, ut cum Juda Proditore Domini, damnationis sententia feriantur.* Simeo. *Hist. de Dunelm. Eccl.* Nor are *Korah* and his Confederates the only persons whom the Earth interr'd alive for their Rebellion against the Sacerdotal Function; for (if you will credit Tradition) the like hath since happened in the case of *Sacrilege* to the *Scotch Army*, which in the said *Guthred's* time had no sooner (according to their Modern Practice) fleec'd the Church of *Lindisfarne* nigh *Tweed*, to tunick their *Long-shanks*, but the Earth greedily opened her mouth, and devour'd these Devourers, at that very instant when they were all ready to engage in a Battel with the said King of *Northumberland*, dict. *Sim. ibid.* But not to rake up Antiquity for discovery of what *Legends* and *Romances* lie under the Ashes thereof; this is as well True as Chronicled, That King *William Rufus* was *Casu fortuito, non voluntarie*, darted to death instead of a Stag by a certain *Franck*, one *Walter Tyrell*, in the same place, which his Father the Conquerour had Sacrilegiously disecclasiated for more than 30 Miles, to Forest it into *Speluncas latronum & lustra ferarum.* This was a real *Sacrilege* in a Victorious Monarch; which added little

little to the Credit of his *Conquests*; but that in Pope *Boniface* the Seventh (if Historians do not bely him) was a *Personal Sacrilege*, who when he understood that the *Roman* Citizens conspired against him, took with him all the Jewels of the Church of *St. Peter* and fled to *Constantinople*, where he converted the same into money for the proper use of his *Sacrilegious* Holiness.

Simony.

Another gross offence, and little inferiour to the former, within the cognizance of the Church, is *Simony*, or that *Art Magick* whereby Parsons, scarce worth the name of Persons, as the Devil did into our Natural Mother insensibly, so they Serpentine themselves into our Spiritual Mother, the Church visible, invisibly. *Hildebrand*, or by an alias Pope *Gregory* the Seventh, Conven'd a Synod General against Church-purchasers and buyers of Ecclesiastical Livings, and against such Bishops as from the hands of Kings or Emperors receive the investiture of their Bishopricks *per traditionem Anuli & Baculi*; he said, That *Quisquis Episcopatum mercatur, contra Spiritum Sanctum, qui donum Dei dicitur, facit.* He likewise made a Decree in the year 1074. That not only the Buyer and Seller of any Ecclesiastical Office, but whoever also that is consenting thereunto, shall be damned with *Simon Magus*. *Simeon Dunelm. Hist. de Gest. Reg. Angl.* It is unavoidable, for the Pope, who hath the Keys of Hell by his girdle, hath so Decreed it. But Pope *Gelasius* was in this matter better natur'd by far, for he lett some place for Repentance, and proceeded not an inch beyond a Reverfable Anathema; *Si quis vendiderit, aut emerit vel per se, vel per alium, Episcopatum, Abbatiam, Deconatum, Archidiaconatum, Presbyteratum, Præposituram, Præbendam, Altaria, vel quælibet Ecclesiastica Beneficia, Promotiones, Ordinationes, Consecrationes, Dedicationes Ecclesiarum, Clericalem tonsuram, Sedes in choro, aut quælibet Ecclesiastica Officia, & vendens & emens Dignitatis & Officii sui ac Beneficii periculo subjaceat. Quod nisi resipuerit, Anathematis mucrone*

mucrone perfoſſus, ab Eccleſia Dei quam læſit, modis omnibus abſcidatur. The like was Ordain'd by a Council of 300 Biſhops Conven'd at Rome, Pope Calixtus the Second being Preſident, viz. *Ordinari quemquam per pecuniam in Eccleſia Dei, vel promoveri auctoritate Sedis Apoſtolice modis omnibus prohibemus. Si quis vero in Eccleſia Ordinationem vel Promotionem taliter adquiſerit, acquiſita careat prorsus dignitate. dict. Simeo. ubi ſupra.* The ſame in terminus you have Ordain'd at a Synod Conven'd at *Westminster* An. 1126. in the Reign of King Henry the Firſt, *Honorius* the Second being then Pope, viz. *Sanctorum Patrum veſtigiiis inherentes, quenquam in Eccleſia per pecuniam ordinari auctoritate Apoſtolica prohibemus.—ibid.* And at another Council Conven'd at *Westminster* in the year 1175. under the Reign of King H. 2. it was Ordain'd, that all *Simoniacal* Patrons ſhould be deprived of their Right of Preſentation for ever; *Nulli liceat Eccleſiam nomine dotalitii ad aliquem transferre; vel pro Præſentatione alicujus perſonæ pecuniam vel aliquod emolumentum, pacto interveniente, recipere. Quod ſi quis fecerit, & in jure vel convictus vel Confessus fuerit, ipſum tam Regia quam noſtra freti auctoritate Patrocinio ejusdem Eccleſiæ in perpetuum privari Statuimus. Can. 8. vid. Chron. Gervaf. de Temp. H. 2.* It is Reported of the Emperour Henry, Son of *Conradus*, that in his youth he accepted of a Silver Pipe from a certain Clerk on this Promise and Agreement, That when he ſhould be made Emperour he ſhould beſtow a Biſhoprick on the ſaid Clerk, the which he after did accordingly when he became Emperour; but not long after the Emperour being ſurpri'd with Sickneſs, and his Diſeaſe increaſing he lay ſenſleſs and ſpeechleſs for three days, and ſo rapt as it were out of the Body, that he lay as one dead, the Biſhops appointed a Three days Faſt for the Emperours Recovery, which having obtain'd, he doth immediately by a Decree of the Council degrade the Biſhop whom he had *Simoniacally* ſo made for a Silver Pipe; for it was confeſſed by all that heard thereof, That he was among
the

the Divils during the space of all those Three days wherein he lay as dead, those Divils all that while darting fiery Flames through a Pipe into his mouth, whereby his whole body became but as one Firebrand, in comparison whereof our Material Fire here on Earth was but as congealed Ice to it, &c. As you like this, so you may have more out of the same Infallible Author, viz. *Jo. Bromton*, in *Chronico suo*. At a Council Assembled at *Mantua* by the Emperour *Henry* the Fourth in the year 1066. by the Third Canon of that Council it was Ordain'd, That *whosoever was admitted to a Church Office, willingly and wittingly by a Simoniack person, should be removed from his Order*: And by the Sixth Canon of the same Council it was likewise Ordain'd, That *no Ecclesiastical Office or Benefice should be sold for Money, but freely given*. Also by the Seventh Canon of the Council at *Rome*, consisting of 180 Bishops in the year 1180. under Pope *Alexander* the Third, it was Ordained, That *no Reward be taken for admitting men to Spiritual Offices, and that no money be taken for Blessing them that are Married, or for Administration of any other Sacrament*: For at this time Marriage was counted a Sacrament of the Roman Church. He that *Simoniacally* enters on an Ecclesiastical Living, aim'd at something worth money; he cannot be supposed to intend principally the Ministry of Souls, who comes to that Office instructed only with a bag of Money. In *Ireland* there is a Custome of receiving Oblations at the Baptism of Infants; but if the Priest shall refuse to Baptize the Infant till he be secured of his Money, he is a direct *Simoniack*, for then he sells the Sacrament at a price certain. It is Recorded in History of *Henricus Auceps*, that when he fought against the *Hungarians*, he made a Vow to God, That if he would give him Victory, he would purge his Countrey of *Simony*. *Epiphanius*.

The precedent Evils of *Sacrilege* and *Simony* are no farther punished than as they are reduced into act and practice; but *Herese*, which in the method of the subsequent *Abridgement* next follows, and as within the Ecclesiastical cognizance, is more *speculative*, having its Seat more in the *Head* than in the *Hand*, and consequently of the more pernicious quality, in regard of its poysonous venom in these more noble parts, the Head and Heart: Nor is it onely the poyson of the Soul, fatal in whom it is; but it is also the Plague and Leprosie of the Soul, dangerously infectious to others in whom but very lately it was not. This *Herese* may be defin'd to be a *Publisch'd Opinion*, repugnant to the Principles of our *Christian Faith*; obstinately maintain'd and persisted in by such as profess the Name of *Christ*; and so Hereticks are distinguish'd from *Atheists* and *Insidels*, properly so called, albeit in a sense they have somewhat of both the other in them: He seems to give it an adequate definition, that made one for it by the true interpretation of the Greek word, *Hæresis* Græce, *Electio* Latine, est *sententia humano sensu Electa, Scripturæ Sacræ contraria, palam docta, pertinaciter defensa*: And he seems to give the *Heretick* an apt comparison, who made one for him by the *Mole*, which is a Beast blind, with a black, but smooth outside, lurking in holes, working under ground, and spoiling the best Land. In the black List or Catalogue of *Hereticks*, which you meet with in its proper Chapter of the ensuing *Abridgement*, you will not find all those Heresies mentioned by *Epiphanius contr. Hæres. lib. 2.* being purposely omitted for brevity's sake, because they were like abortive Births, and continued not long to disturb the Peace of the Church, *Hereses* of old, as of late days, have ever crept into the Church under a double pretence; the one, of zeal to the glory of God; the other, of a detestation of Sin; the Devil would cease to be the *Old Serpent*, if after so many thousand years experience he were now to learn how to wheedle and deceive the Nations. It is observable, that whenever and wheresoever the

Light of the Gospel hath appeared in any more than ordinary lustre and purity, there immediately the Devil hath exerted the utmost of his power and policy to obscure that Light, by causing Clouds of *Error* to gather in that Element where the Gospel so increased in purity and splendour; and whenever he desists from this practice, let him no more be styled *The Prince of Darkness*; whence if *Simon Magus* were (as some say) the Father of *Hereticks*, you may guess who their Grandfather is; for according to the infernal genealogy, the *Father of Lies* must needs be the *Grandfather of Heresies*.

Blasphemy.

In this ensuing *Abridgment* therefore you have one Chapter of *Blasphemy* and *Herefie*, as being also within the sphere of Ecclesiastical Cognizance; they are plac'd together, in regard of that affinity they have each to other; for many of them are *Cosin-Germans*, but one degree of a Lie removed, or rather are *Brethren in Iniquity*, for they have both the same Father, *Ye are of your Father the Devil*, &c. he abode not in the Truth (says our Saviour of the Jews that believed not;) many of whom *Blasphemously* said of him, *That he had a Devil, and was mad*: Others of them were foretold of by St. Peter, *That they privily should bring in damnable Heresies, even denying the Lord that bought them*, &c. wresting the Scriptures unto their own destruction. *Βλασφημῶν*, *Blasphemare*, that is, *convitiis incessare*, to speak reproachfully and wickedly of God, to ascribe to the Creature what belongs onely to God, *vel ab eo remove. quod illi convenit*, says St. Ambrose, or to prefer a False god before the True God, *Rev. 13. 1*. This kind of *Blasphemy* refers chiefly to *God the Father*. There is *Blasphemy* likewise which refers to *God the Son*; such was the *Blasphemy* of the Pharisees, when they said of *Christ*, *That he was a man gluttonous, and a Wine-bibber*, &c. This they might probably say out of their ignorance of his Person, and therefore a much inferiour *Blasphemy* to that against the *Holy Ghost*, which is ever against Conscience, and out of Envy.

Envy and Malice. *Bartolus* is of opinion, That there is a *Blasphemy* also which refers to Men. *Bart. in l. Item apud, §. ait Prætor. ff. de Injur.* But this is not that *Blasphemy* here intended, although that Opinion seems to be back'd with good Authority, *1 Cor. 4. 13. & Tit. 3. 2.* yet *St. Austin*, who understood this matter better than *Bartol*, was of another opinion, *Est autem Blasphemia* (says he) *cum aliqua mala dicuntur de bonis. Itaque jam vulgo Blasphemia non accipitur, nisi mala verba de Deo dicere. De hominibus namque dubitari potest: Deus vero sine controversia bonus est.* *D. August. in lib. de Morib. Manichæor. cap. 11.* It is but a weak illustration of the matter, to say *Quod in homines est Contumelia, hoc in Deum est Blasphemia.* It may formally be defined to be an *Injurious and Contumelious Speech against God*: It is diametrically opposed to *Divine Praise*; and both these may be as well *Internal*, of the Heart, as *External*, of the Mouth, for in Gods Omnipiscency there is the language of the Heart, as well as of the Lip; and there may be *Blasphemy* in the one, as well as of the other. By the *Levitical Law* the *Blasphemer* was to be stoned to death. Levit. 24. By the *Civil Law* he was likewise to die for it. *Athen. ut non Luxuriatur, in fin.* But this penalty in those days by reason of a defect of Religion and Justice is not inflicted, says *Lucas de Penna, in L. omnes. C. de Delatorib. & Ful. Clarus. §. Blasphemia, nu. 3.* yet *Blasphemers* of the highest rank are at this day put to death in some places, in others they are condemn'd to the Oars, in some places they are Banish'd, in others they have their Tongues cut off, or an hole bored through with an hot Iron, *ut refert Clarus.* By the *Canon Law* solemn Penance was anciently enjoyn'd to Lay-*Blasphemers.* *c. 2. de Maled.* But this is not now in use. The Council of *Lateran* under Pope *Leo* the Tenth, Commanded that such *Blasphemers* should not be absolved *in foro Conscientiæ absque gravissima pœnitentia. dict. Concil. Sess. 9. §. Ad abolendum.* There are some who would have *Hereſie* Hereſie. to be a kind of *Blasphemy*; doubtless there are some

Heresies that are very *Blasphemous*; but *Heresie* in *sui natura* is quite another thing; for as *Blasphemy* is *de Deo male dicendo*, so *Heresie* is *de Fide Catholica male eligendo*; for the word *Hæresis* is derived ἀπὸ τῆς αἰγλο-
 ποας, *Eligo*, whence they are understood as *Hereticks*, who departing from the true Catholick Faith of Christ *aliam sectam Eligunt*. Some there are, who would have all *Hereticks* to be divided into the *Major* and the *Minor*; by the *Major* they will have to be understood all those *qui nominatam hæresin prædicant*, such of old were the *Manichæans*, *Arians*, *Eutychians*, *Samaritans*, *Ophites*, *Donatists*, *Priscillianists*, and the like: By the *Minor*, those *qui hæresin innominatam defendunt*. *Drosæus in Method. Jur.* Thus the Philosophers of old had their *Sects* also among them, & *unusquisque sibi aliquod genus discipline ac Sectæ proprium elegit*; there were various *Factions* among them, which by the *Greeks* were termed *Heresies*, but by the *Latins*, *Sects*. Among the *Ancients* this word *Heresie* was not sensed in that *odium* as now with us, nor the word *Secta* among the *Latins*; *St. Paul* himself speaks of it in one place as in a sense almost indifferent, *Act. 26. 5*. Notwithstanding it is well known, that the Holy Scripture generally understands and speaks of it in *pestimam partem*; so in *Tit. 3. 10*. *A man that is an Heretick after the first and second Admonition reject*: And in *1 Cor. 11. 19*. *There must be Heresies among you, that they which are approved, may be made manifest*: And in *Gal. 5. 20*. *Heresies are numbred among the works of the Flesh*: And in *2 Pet. 2. 1*. they are called *Damnable Heresies*. By the *Civil Law* an *Heretick* can neither make a *Testament*, nor receive any *Benefit* by a *Testament*. *L. fin. C. de Hæreticis*. And if you will believe *Thomas Aquinas* (as in this you very safely may) all *Hereticks* by robbing the Holy Scriptures of the *Truth* to establish their pernicious *Lies*, are guilty of a kind of *Sacrilege*; and by Fathering such *Lies* on God, tacitly of *Blasphemy*. *Aquin. ar. 2.*

In the One and fortieth Chapter of the ensuing Treatise you have a brief Catalogue of the Councils according to our computation, here you have them more succinctly according to the Roman account: *Sebastus* a Judge in *Thessalonica*, in the time of *Constantius Harmenopolus* says, That some of the Ecclesiastical Canons were of the Holy Apostles, others of the Seven Oecumenical Councils, others of particular Synods, and others of certain * Fathers of the Church; to say nothing of the Papal Decretals ordered to be compiled by *Pope Gregory the 9th*. The First Oecumenical Council was Conven'd at *Nice* under *Constantine the Great*, against *Arius*, who held the Son of God to be a mere Creature: This Council consisted of 318 Bishops, by whom *Arius* was Anathematiz'd, and his Heresie condemned. The Second was at *Constantinople* under *Theodosius the Great*, against the *Pneumatomachists*, who denied the Divinity of the Holy Ghost: This Council consisted of 150 Bishops, by whom these Hereticks together with their damnable heresie, was accursed. The Third was at *Ephesus* under *Theodosius the Less*, against *Nestorius* and *Celestinus*, who held that *Christ* was onely Man: At this Council were 200 Bishops, by whom these Hereticks were likewise censured as the former. The Fourth was at *Chalcedon* under *Marcianus*, against *Dioscorus* and *Eutyches*, who held that the Two natures of the Word, viz. of God and Man, were after the Union reduced into one Nature; for which they were Anathematiz'd by 630 Bishops there Convened. The Fifth was at *Constantinople* under *Justinianus the First*, where 160 Bishops were present, who confirmed the Decrees of the Fourth Synod, and condemned *Origen* and all other Hereticks. The Sixth was also at *Constantinople* under *Constantinus Barbatus*, where were Assembled 170 Bishops, who pronounced the Sentence of Anathema against all those *qui unam in Christo voluntatem, & unam agendam vim tradebant*. The 7th was at *Nice* under *Constantine* and his Mother *Irene*, where 367 Bishops were assembled against the Adversaries of Images, whom they subjected

Councils.

* If by certain Fathers of the Church are here meant any of the Popes, observe what B. Taylor says; It is no trifling consideration (says he) that the Body of the Canon Law was made by the worst and most Ambitious Popes: Alexander the Third, who made *Gracian's* Decree to become Law, was a Schismatical Pope and Antipope, and unduly Elected: The rest were Gregory 9. Boniface 8. Clement 5. John 22 persons Ambitious, and Traytors to their Princes. B. Taylor's Cases of Conscience. l. 3. c. 4. nu 4. l. 647.

to.

to their *Anathema*. (2) Of Particular Synods, one was held in the *Temple* of the *Apostles* in *Constantinople* under the Patriarch *Phorius*, which was called the *First* and *Second*: Another under *Leo* and *Constantine* in the most Famous *Temple Sanctæ Dei Sapientiae*, or *Sanctæ Sophiæ*, which confirmed the *Seventh Synod*: Another at *Ancyra*, more ancient than the first *Universal Synod*: Another at *Cæsarea*, more ancient than that at *Ancyra*: Another at *Gangra*, after the *Nicene*, against *Eustachius* who despised Marriage, and taught things not consonant to Ecclesiastical Tradition: Another at *Antioch* a *City in Syria*, where in truth were two Synods, the one under *Aurelianus* against *Paulus Samosatenus*, who said that *Christ* was mere *Man*; the other under *Constantius* Son to *Constantine the Great*: Another at *Laodicea*, situate in *Phrygia Pacatiana*: Another at *Sardica*, that when *Constantius* embraced the foresaid Sect, his Brother *Constans*, Emperour of *Old Rome*, by his Letters threatening him with a War, if he would not desist from perverting the Church; his Answer was, That he sought no other Doctrine, than what was most agreeable to the *Catholick Faith*; whereupon by their and the Bishop of *Rome's* appointment 341 Bishops were Conven'd in a Synod, which having established the power and authority of the *Nicene Synod*, did constitute divers Canons for the Church: Another at *Carthage* under *Theodosius*, where 217 Bishops were assembled, and with them the Pope's Vicegerents; this *Carthage* was part of *Charchedon*, and that a Province of *Africa*. (3) The Canons of the Fathers are taken (according to the *Roman* computation) out of the Epistles partly of *Dionysius Alexandrinus*, partly of *Petrus Alexandrinus*, partly of the Wonder-working *Gregorius*: partly also out of the Epistles of *Basil* or *Basilius the Great*: partly out of the Epistle of *Gregory* or *Gregorius Nyssenus* to the B. of *Melita*: partly out of the Responses of *Timotheus Alexandrinus*: partly out of the Responses of the *Constantinopolitan Synod* to certain Monks, *Nicholaus* the Patriarch being President: partly out of the Epistles of *Cyril* or *Cyrillus*:

Cyrius: and partly out of the Epistles of *Nicephorus* the Patriarch. (4) The Canons of the Holy Apostles (a book falsely ascribed to the Apostles) are in number 85, according to a modest Computation, if you have any Faith to spare, at least enough to believe the Church of Rome, in that as in other Points, infallible. But the Canons indeed of the Apostles, which are of Order and External Government, do oblige (as Dr. Taylor says) the Conscience, by being accepted in several Churches, not by their first Institution; and were fitted only to Times and Places, and present Necessities: For (says he) the Apostolical Decree of Abstaining from Blood was observed by more Churches, than those of Syria and Cilicia, to which the Canon was directed; and the College of Widows or Deaconesses, derived it self into the manners of the Western Churches. And the Apostles in their first Preaching and Conversation in Jerusalem instituted a cœnobotick life, and had all things in Common with Believers: (indeed no man was obliged to it.) Of the same nature were their Canons, Counsells, and Advices. The Canon concerning Widows, Let not a Widow be chosen under 60 years; and yet Justinian suffered one of 40 years old to be chosen. Novel. 123. c. 12, 13. And the Canon of the Apostles forbidding to eat things strangled, is no where observed in the Western Churches of Christendom. In the beginning of the Fourth Century, above 1300 years since, we find our Bishops, British Bishops, at the Councils of Arles, Nice, Sardis, and Ariminum; a clear evidence of the flourishing State of Christianity so long since in this Island. At Arles in France, conven'd touching the Donatists, appeared for the Britains, Eborius Bishop of York, Restitutus Bishop of London, Adelfius Bishop of the City called the Colony of London, which some suppose to be Colchester, others Maldon in Essex; Sacerdos, a Priest both by Name and Office; Arminius, a Deacon, An. 313. At the Synod of Nice in Bythinia, An. 325 to suppress Arianism, were British Bishops present, as Athanasius and Hilary Bishop of Poitiers affirm. At the Council of

Anonym.
The History
of the Church
of Great
Britain.

Sardis.

Lib. 4. c. 5.

Sardus in *Thracia* conven'd by *Constantinus* and *Constans*, Sons to *Constantine* the Great; the *British* Bishops were likewise present, when the *Arians* were condemn'd, and *Athanasius* acquitted. And at the Council of *Ariminum* in *Italy* the *British* Bishops were also present; who (according to *Athanasius*) were about *An.* 360. summoned to divers Foreign Councils in remote parts. As also here at home in and after the *Seventh* Century were divers particular Councils and Synods, the first whereof (according to *Stapleton* out of *Bede*) called *The first of the English Nation*, was conven'd at *Hertford* by *Theodorus* Archbishop of *Canterbury*, who succeeded *Deus-dedit* in that See; in this Council the Observation of *Easter* was settled according to the *Romish* Rite; yet whosoever will have this Council to be (as aforesaid) *The first of the English Nation*, must understand it the First, whose Canons are completely extant. *Bede lib. 4. c. 5.* About the year 740 *Ethelbald* King of *Mercia*; with *Cuthbert* Archbishop of *Canterbury*, called a Council at *Cliffe* in *Kent*; the acts of which Synod were 21 Canons, among which it was (*inter alia*) Ordain'd, *That Prayers should publicly be made for Kings and Princes.* But some few years before this, the said *Theodorus* held a Synod or Council of Bishops at *Hatfield*, by authority whereof he divided the Province of *Mercia* (which *Sexwolphus* then governed alone) into five Bishopricks, viz. to *Chester*, *Worcester*, *Lichfield*, *Cedema* in *Lindsey*, and to *Dorchester*. In the year 692 a great Council was held at *Becanceld* by *Withred* King of *Kent*, and *Bertuald* Archbishop of *Britain*, wherein many things were concluded in favour of the Church. About the same time a Council was held at *Berghamsteed* by the said *Withred* King of *Kent*; at which Council Bishop *Wilfrid* was restored to *York*, whence he departed for *Rome*, upon the endeavours which *Theodorus* Archbishop of *Canterbury* had used, to have that Diocese of *York* divided. In the year 801 *Ethelard* the Archbishop called a Synod at *Clivesho* in *Kent*; where by power from the Pope, he *re-visited* (that's the word) the Archbishoprick into the City

City of *Canterbury*. There was likewise at *Celichyth* an eminent Council under *Wolphred*, who succeeded *Ethelard*, Archbishop of *Canterbury*. But nigh one hundred years before this, viz. about the year 709, a Synod was assembled at *Alncester* in *Worcestershire*, to promote the building of *Evesham-Abbey*. And not long after another Synod was called at *London* to introduce the Doctrine of Image-Worship into *England*, now first beginning to appear in the publick practice thereof. Also, above one hundred years before that, viz. about the year 601. *Augustine* by the aid of *Ethelbert* King of *Kent*, called a Council of *Saxon* and *British* Bishops to meet in the Confines of the *Mercians* and *West-Saxons*, in the borders of *Worcester* and *Herefordshire*, under an Oak; thereby tacitly reproving the Idolatry of the Pagan *Britains*, who acted their Superstitions under an Oak as the Learned Sr. *H. Spelman* observes. In the Tenth Century King *Edward* the Elder, Son of King *Alfred*, Spelm. Conc. called a Synod at *Intingsford*, where he confirmed the same Ecclesiastical Constitutions which King *Alured* had made before. Many Councils were Conven'd during the Reign of King *Athelstan*, as at *Exiter*, *Feversham*, *Thunderfield*, *London*, and at *Great Lea*, which last is of most account in regard of the Laws therein made, specially that concerning the payment of Tithes; the which you may peruse in the Learned Sr. *H. Spelm. Council. p. 405*. During the Reign of King *Edgar*, *Hoel Dha* held a National Council for all *Wales* at *Tyquin*, which was wholly in favour of the Clergy; this Council was held when *Dunstan* was Archbishop of *Canterbury*; in whose time there were Two other Councils conven'd the one at *Cartlage* in *Cambridgshire*, the other at *Caln* in *Wiltshire*. After this *William* the Conquerour conven'd a Council of his Bishops at *Winchester*, wherein himself was personally present, with two Cardinals sent from *Rome*; in this Council *Stigand* Archbishop of *Canterbury* was deposed, and *Lanfranck* a *Lombard* substituted in his room. During the Reign of King *Henry* the First *Aneslm* Archbishop of *Canterbury* summoned a Council

at *Westminster*, which Excommunicated all Married Priests, half the Clergy at that time being Married, or the Sons of Married Priests. During the Reign of King *Stephen*, *Albéricus* Bishop of *Hostia*, sent by Pope *Innocent* into *England*, convened a Synod at *Westminster*, wherein it was concluded, *That no Priest, &c. should have a Wife or a Woman in his house, on pain of being sent to Hell. Also that their Transubstantiated God should dwell but Eight days in the Box, for fear of being Worm-eaten or moulded.* Under the Reign of King *Henry the Second* (who disclaimed the Pope's authority, refused to pay *Peter pence*, and interdicted all Appeals to *Rome*) a Synod was called at *Westminster*, wherein was a great Contest between the two Archbishops of *Canterbury* and *Tork* for Precedency; *Tork* appeals to *Rome*, the Pope interposes, and to end old Divisions makes a new distinction, entituling *Tork* Primate of *England*, and *Canterbury* Primate of all *England*. Under the Reign of King *Henry the Third* a Council was held at *Oxford* under *Stephen Langton* Archbishop of *Canterbury*, wherein many Constitutions were made, as against Excess of demands for *Procurations* in Visitations, against Pluralities, Non-Residence, and other abuses of the Clergy. In the Ninth year of King *Edward the First*, *John Peckham* Archbishop of *Canterbury*, held a Council at *Lambeth* with his Suffragans, some account whereof *Walsingham* gives us in these words, *viz. Frater Johannes Peckam, Cantuariensis Archiepiscopus, ne nihil fecisse videretur, convocavit Concilium apud Lambeth, in quo non Evangelii Regni Dei prædicationem imposuit, sed Constitutiones Orthonis & Ottobonis quondam Legatorum in Anglia innovans, jussit eas ab omnibus servari, &c.* *Walsing. in Ed. 1.* He then made Sixteen Ecclesiastical Laws, which are inserted among the Provincial Constitutions. After this he summoned another Council of his Clergy at *Reading*, wherein he propounded the drawing of all Causes concerning *Advowsons* to the Ecclesiastical Courts, and to cut off all *Prohibitions* from the Temporal

poral Courts in Personal Causes; but upon the King's express Command to desist from it, this Council was dissolved. *Parker de Antiq. Eccles. Anglic. fo. 205. An. 1290.* During the Reign of King *Henry the Fourth*, *Thomas Arundel* Archbishop of *Canterbury* conven'd a Synod at *S. Paul's Church London*; wherein the King joyned with them in punishing all opposers of the Religion received. *John Trussel. de vita H. 4.* Under King *Henry the Fifth* an Universal Synod of all the Bishops and Clergy was called at *London*, where it was determined, That the day of *St. George*, and also of *St. Dunstan*, should be a double Feast in Holy Church, In the same King's Reign was a Convocation held at *London*, conven'd by *Henry Chicheley* Archbishop of *Canterbury*, wherein were severe Constitutions made against the *Lollards*. In the Reign of King *Henry the Seventh* a Synod was held at *London* by *John Morton* Archbishop of *Canterbury*, to redress the Excess of the *London* Clergy in Apparel and frequenting of Taverns. We had almost omitted the Synod in *England An. 1391.* under the Reign of King *Richard the Second*, *Simon Sudbury* then Archbishop of *Canterbury*; in which Synod it was Ordain'd, That whosoever Appealed to *Rome* (besides Excommunication) should lose all his Goods, and be imprisoned during his Life. *vid. Hist. of the Church of Great Britain, --- p. 117.* A Modern and Ingenious, yet unfortunate, Authour well observes a Fourfold difference or distinction of Synods or Convocations in this Realm, in reference to the several manners of their Meeting, and degrees of their Power. The First, he states in point of Time before the Conquest. The Second, since the Conquest, and before the Statute of *Præmunire*. The Third, after that Statute, but before another made in the Reign of King *H. 8.* The Fourth, after the 25th of the said King. (1) Before the Conquest The Popes power prevailed not over the Kings of *England*, who were then ever present Personally or Virtually at all Councils, wherein matters both of Church and State were debated and concluded, † *Communi Consensu tam* † *Spelm. An. 605. p. 118.*
Cleri quam Populi, Episcoporum, Procerum, Comitum, nec

non omnium Sapientum Seniorum popularumque totius Regni. (2) After the Conquest, but before the Statute of *Præmunire*, the Archbishops used upon all emergent Cases, *toties quoties*, at their own discretions to assemble the Clergy of their respective Provinces, where they pleased, continuing and dissolving them at their pleasure; which they then did without any leave from the King; whose Canons & Constitutions (without any farther Ratification) were in that Age obligatory to all subjected to their Jurisdiction. Such (it seems) were all the Synods from Lanfranck to Tho. Arundel, Archbishop of Canterbury, in which Arundel's time the Statute of *Præmunire* was Enacted. (3) After which Statute (which much restrained the Papal power, and subjected it to the Laws of the Land) the Archbishops called no more Convocations by their sole and absolute Command, but at the pleasure of the King, by whose Writ and Precept onely they were now and henceforth summoned. Of this Third sort of Convocations, were all those kept by and from Thomas Arundel unto Thomas Cranmer, or from the 16th of R. 2. unto the 25th of King H. 8. These Convocations also did make Canons (as in Lindwood's Constitutions) which were Obligatory, although confirmed by no other Authority than what was merely Synodical. (4) The last sort of Convocations, since the said Statute called the 25th of King H. 8. That none of the Clergy should presume to attempt, alledge, claim, or put in ure, any Constitutions, or Ordinances Provincial, or Synodals, or any other Canons, Constitutions, or Ordinances Provincial (by whatsoever Name or Names they may be called) in their Convocation in time coming, (which always shall be assembled by the King's Writ) unless the same Clergy may have the King's most Royal assent and License to make, promise and execute such Canons, Constitutions and Ordinances Provincial, or Synodical, upon pain of every one of the said Clergy doing the contrary to this Act, and thereof convicted, to suffer imprisonment, and making Fine at the King's will. Since this year, from Archbishop Cranmer to this day, all Convocations are to have the

the King's leave to debate on matters of Religion; and their Canons (besides his Royal assent) an Act of Parliament for their Confirmation. And as to the General Councils, there are not any of them of use in *England*, except the first Four General Councils, which are established into a Law by King and Parliament.

Dr. Tayl, *Ca*
of Consc. lib. 3
cap. 4. f. 637.

The Learned Bishop *Prideaux* in his *Synopsis* of Councils gives us the definition of *Synodographie*, and says, It is such a Methodical *Synopsis* of Councils and other Ecclesiastical Meetings, as whereby there may be a clear discovery to him that doubts, how any Case may be enquired after, and what may be determined concerning the same. And then immediately after gives us the definition of a *Council*, which he calls a Free Publick Ecclesiastical Meeting, especially of Bishops, as also of other Doctours lawfully Deputed by divers Churches, for the Examining of Ecclesiastical Causes, according to the Scriptures, and those according to the power given by common Suffrages, without favour of parties to be determined, in matters of Faith by Canons, in cases of Practice by Presidents, in matters of Discipline by Decrees and Constitutions. Of these Councils he observes some to have been *Judaical*, others *Apostolical*, others *Oecumenical*, some *Controverted*, others *Rejected*, and some *National*, to all which he likewise adds *Conferences*. (1) Under the Title of *Judaical* Councils he comprehends the more solemn Meetings about extraordinary affairs for the Confirming, Removing, or Reforming any thing, as the matter required. Such he observes to have been at *Sichem* under *Joshua* and *Eleazer*, *Josb.* 24. At *Jerusalem*, the first under *David*, *Gad* and *Nathan* being his Assistents, *1 Chro.* 13. At *Carmelita* under *Abab* and *Elias*, *1 King.* 18, At *Jerusalem*, the Second under *Hezekiah*, *2 Chro.* 29. At *Jerusalem*, the Third under *Josiah* and *Hilkiab*, *2 King.* 33. *2 Chro.* 34. At *Jerusalem*, the Fourth under *Zorobabel* and *Ezra*, and the Chief of the *Jews*, that return'd from the Captivity of *Babylon*. And lastly, that which is called the *Synod of the Wise* under *John Hircanus*. *Genebrand Chron.* l. 2. p. 197. (2) The *Apostolical* Councils

Councils he observes to have been, for the substituting of *Matthias* in the place of *Judas*, *Act.* 1. For the Election of Seven Deacons, *Act.* 6. For not pressing the Ceremonial Law, *Act.* 15. 11. For the toleration of some Legal Ceremonies for a time, to gain the Weak by such Condescension, *Matth.* 21. 18. For composing the Apostles Creed. For obtruding to the Church 85 Canons under the notion of the Apostles authority, concerning which there are many Controversies. Lastly, for the Meeting at *Antioch*, where among Nine Canons, the Eighth commanded Images of *Christ* to be substituted in the room of Heathenish Idols; the other pious Canons being destitute of the Synod's authority. *vid. Bin. Tom. 1. p. 19. & Longum p. 147.* (3) Of Oecumenical or General Councils, some were *Greek* or *Eastern*, others were *Latin* or *Western*. The more Famous of the Oecumenical *Greek* Councils were, the *Nicene*, the first of *Constantinople*, the first of *Ephesus*, the first of *Chalcedon*. Of *Constantinople*, the second of *Constantinople*, the third. The *Nicene* the second. The more Famous of the Oecumenical *Latin* Councils were at *Ariminum*: the *Lateran*: at *Lions*: at *Vienna*: the *Florentine*: the *Lateran* the fifth; and lastly at *Trent*. (4) Of Controverted Councils (if that distinction be admissable, according to the Classis thereof digested by *Bellarmino*) the Computation is at *Constantinople* the fourth: at *Sardis*: at *Smyrna*: at *Quinisext*: at *Francfort*: at *Constance*; and at *Basil*. (5) Of Rejected Councils (whereby are intended such as either determine Heretical Opinions, or raise Schisms) the Computation is at *Antioch*: at *Milan*: at *Seleucia*: at *Ephesus* the second: at *Constantinople*: at *Pisa* the first; ; and *Pisa* the second. (6) Of National Synods, which comprehend the Provincials of every Metropolitan or Diocesan Bishop, the distribution is into *Italian*, *Spanish*, *French*, *German*, *Eastern*, *African*, *Britain*. (7) To these may be added Ecclesiastical Conferences, which were only certain Meeting of some Divines, wherein nothing could be Canonically determined, and therefore needless to be here particularly inserted. *vid. B. Prideaux Syn. of Councils vers. fin.*

The grand Censure of the Church, whereby it punisheth obstinate Offenders, is by way of *Excommunication*, which though the Canonists call *Traditio Diabolo*, or giving the Devil as it were Livery and Seizin of the Excommunicate person, yet the Romanists have a Tradition that S. Bernard Excommunicated the Devil himself, *Sanctus Bernardus, plenus virtutibus, quadam die presentibus Episcopis, clero, & populo, Excommunicavit quendam Diabolum Incubum, qui quandam mulierem in Britannia per septennium vexabat; & sic Liberata est ab eo.* — Chron Jo. Bromton. de Temp. H. 1. A miraculous Excommunication, and a Sovereign Remedy against Diabolical incubations. The Excommunication which St. Oswald pronounced against one, who would not be persuaded to be reconciled to his Adversary, had nothing so good though a more strange effect, for that Excommunicated him out of his Wits, and had it not been for *Wolstan*, who as miraculously cur'd him, you might have found him, if not in *Purgatory*, then in *Bedlam* at this day; *Illi cujus es (says Sanctus Oswaldus) Te commendo, & carnem Sathanae tuam trado. Statim ille dentibus stridere, spumas jacere, caput rotare incipit. Qui tamen à Wolltano sanatus, cum Pacem adhuc recusaret, iterum & tertio est arreptus simili modo, quousque ex corde injuriam remitteret & offensam.* If you have not Faith enough to believe this on the Credit of Abbat Brompton, who Chronicled from the year 588, in which St. Austin came into England, to the death of King Richard the First, which was in the year 1198. if you have not (I say) faith enough for the premisses, you are not like to be supplied with any on this side Rome, unless you have it from Henry de Knighton Canon of *Leyster*, who wrote the Chronicle *De Eventibus Angliæ*, from King *Edgar's* time to the death of King Richard the Second, for he in his Second Book *de Temp. W. 2.* doth put it under his infallible pen for an undeniable Truth. And indeed is much more probable, than what the said Abbat reports touching St. Austin's raising to life the Priest at *Cumpton* in *Oxfordshire* 150 years

years after his death, to absolve a Penitent Excommunicate, that at the same time rose also out of his grave, and walked out of the Church at S. *Austin's* Command, That no Excommunicate person should be present whilst he was at Mass, having in his life-time been Excommunicated by the said Priest for refusing to pay his Tithes. *vid. Chron. dist. Bromton de Regn. Cantuar.* Excommunication is of such a large extent, that this World is too narrow to contain it, therefore it extends it self to the next World also, and that not onely in reference to the Soul, but also to the Body; insomuch that the interr'd Bodies of Persons dying under Excommunication, have often been inhumanely exhumed and taken out of their Parochial graves, to associate with the rotten Carcases of bruit Beasts, a President whereof you have in King *Edward* the Third's time, when the Pope by his Bull to the Bishop of *Lincoln* Commanded, That the Bodies of all such Excommunicates as in their Life-time had adhered to the Lady *Wake*, in the Contest between her and the Bishop of *Ely* touching a Mannor, should be taken out of their Graves, and cast out of the Church-yard. This is much worse than to be denied the honour of a Christian burial, which by the Council at *Rome*, An. 1180. was the punishment of such Lay-persons as transferr'd the Right of Tithes to other Laicks, without delivering them to the Church; yet by the Sixth Canon of that Council it is Ordain'd, *That no man shall be Excommunicated or suspended from his Office, until he be legally and duly summoned to appear and answer for himself, except in such cases as deserve summary Excommunication.* It was a strange Excommunication as to the new and insolent Form thereof, wherewith Pope *Theodorus* Excommunicated *Pyrrhus* Patriarch of *Constantinople*, who having been infected with the Heresie of the *Monothelites*, and thereupon Excommunicated, and upon his Recantation absolved, relapsed into the same Errour, whereupon the said *Theodorus* Excommunicated him the second time, but in such a way and manner, as never had a former President or. second Practice:

For

For he infused some drops of the consecrated Cup into Ink, and therewith writ a Sentence of *Anathema* against *Pyrrhus*. *Hist. Mag. Cent. 7. cap. 39. Whether the Dead may be Excommunicated?* Was the first Question moved in the Fifth General Council at *Constantinople*, An. 551. under the Emperour *Justinian* To which *Eutichius* answered, *That as Josiah opened* ^{2 King. 23. 16} *the Sepulchres of the Dead, and burnt their Bones: So the Memorials of such might be accursed after their death, who had injured the Church in their life; for which pertinent Answer the said Emperour made him Bishop of Constantinople; so that he succeeded Menas, who about the same time had departed this life suddenly, sitting the Council. That worthy Prelate, who affirmed, That it was certainly unlawfull to Excommu- ^{Dr. Taylor in his Cases of Conscience. lib. 3. cap. 4. f. 61 7. nu. 4.} *nicate any man for not paying the Fees of Courts, is scarce so generally credited in his Law, as he may deserve to be in his Doctrines, especially when his Reason for that Assertion, viz. That a Contumacy there (speaking of Courts Ecclesiastical) is an Offence against the Civil Power, is duly weighed and considered; and more especially when such Fees are not paid, notwithstanding the Orders and Decrees of such Courts for the payment thereof: Contempts of which kind might pass wholly unpunished, if Ecclesiastical Censures should not take place in such cases. Many are the Prejudices which ensue upon Excommunication, some whereof (in case of obstinate persistency) reach us as Men, as well as Christians, and seem, as it were, to unman us, as well as unchristian us; extending (per brachium Seculare) as well to our Civil Liberty, as (per censuram Ecclesiasticam) to our Christian; having a dreadfull influence both on Body and Soul, and that in both worlds. *Rebuffus* enumerates no less than above Threescore of these penalties, for so he calls them, *Pœnæ contra Excommunicatos. Rebuff. de Excom. non vitand.* Such persons as are *extra Communionem Ecclesiæ*, or Excommunicates with us, were *apud Hebræos* anciently called *Aposynagogi*, as cast out of the**

Synagogue, and for their Contumacy *Extorres*, to be shunn'd of all men until they repented. *Old*. Such as are *Anathematiz'd* and under the greater Excommunication, are as it were expell'd out of all Humane Society and banish'd from Mankind (understand it of those within the Church;) such an *Anathema* may be somewhat compared to that Punishment, which the *Romans* of old called *Interdictio ignis & aquæ*, borrowed from the *Græcians*, which their great Legislator *Draco* enacted as a Law to the *Athenians*, and which Punishment in truth was second to none, save that which is Capital.

*Circumspecte
Agatis.*

Towards the close of this Ecclesiastical Abridgment you have some mention made of the Statute of *Circumspecte Agatis*: In the Thirteenth year of the Reign of King *Edward the First*, *An. 1285*. the Bounds and Limits of both Jurisdictions *Spiritual* and *Temporal* were fix'd by Parliament, by a Statute under that Title, the *English* whereof translated from the *Latin* out of the *Records* runs thus, *viz.*

*The King to his Judges sendeth Greeting. Use your selves circumspectly in all matters concerning the * Bishop † of Norwich, and his Clergy, not punishing them, if they hold Plea in Court Christian, of such things as be meerly Spiritual, viz. of penance enjoyned for deadly Sin, as Fornication, Adultery, and such like: for the which many times corporal penance or pecuniary is enjoyned, specially if a Freeman be convict of such things.*

* Supposed to be William Middleton.
† Norwich
An Example in one, to stand as a President for all.

Also if Prelates do punish for leaving Church-yards unclosed, or for that the Church is uncovered, or not conveniently decked; in which cases none other penance can be enjoyned, but pecuniary.

Item, If a Parson demand of his Parishioners Oblations and Tithes due and accustomed; or if any person plead against another for Tithes, more or less, so that the Fourth part of the value of the Benefice be not demanded.

Item

Item, If a Parson demand Mortuaries in places where a Mortuary hath used to have been given.

Item, If a Prelate of a Church, or if a Patron demand a Pension due to themselves, all such demands are to be made in a Spiritual Court. And for laying violent hands on a Priest; and in case of Defamation, it hath been granted already, that it shall be tried in a Spiritual Court, when money is not demanded, but a thing done for punishment of Sin, and likewise for breaking an Oath. In all cases afore rehearsed, the Spiritual Judge shall have power to take knowledge, notwithstanding the King's Prohibition. vid, Lindw. Constit. lib. 2. Tit. De Foro Competenti. Vid. Full. Chur. Hist. lib. 3. p. 79.

Now whereas some doubt hath heretofore been, whether this were indeed an Act of Parliament, or any thing more than a Constitution made by the Prelates themselves, or onely a mere Writ issued out from the King to his Judges, Sr. Ed. Coke. Instit. par. 2. pag. 487. resolves it in exprefs terms thus, viz. Though some have said, that this was no Statute, but made by the Prelates themselves; yet that this is an Act of Parliament, it is proved not onely by our Books, but also by an Act of Parliament. *see Pryn. Records vol. 3. p. 336. & Observ. upon Stat. 99.*

By this Statute of *Circumspette Agatis*, the Ecclesiastical Court might proceed to punish the Offender, who offered violence to a Priest; the which *de jure* it might do by proceeding *Ex & Officio pro salute animæ*, Damages on an *Action of Battery* in the case reserved to the Common Law.

To conclude; The Protestation which Bellamera the Canonist, in the Proeme to his Lecture on the *Clementine Constitutions* makes, shall (as to this *Repertorium Canonicum*, *Jurisve Anglico-Ecclesiastici Compendium*) be mine, *Id submittens correctiooni & determinationi tam Canonum Ecclesiasticorum, quam Statutorum, Jurumque Publice Forensium & Secularium, & cujuslibet melius sentientis, Protestans, quod si in præsentis Opusculo de lapsu calami, aut inadvertentia, vel forte*

ex ignorantia aliqua jam Scripsero, id præter intentionem scribere me contigerit: Si etiam aliqua Scripsero, quæ errorem saperent, aut male sonarent, illa ex nunc Revoco, & volo haberi pro non Scriptis; Determinationibusque Ecclesiæ Anglicanæ, & dicti Juri Forensis Oraculis semper, & in omnibus volo stare. Et hanc Protestationem volo pro Repetita haberi in quolibet Dictorum meorum, & etiam condicendorum, ut si reprobantur dicta, Actor non propter hoc reprobetur.

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A N

AN ABRIDGMENT OF ECCLESIASTICAL LAWS.

CHAP. I.

Of the King's Supremacy.

1. *A Description thereof, or what it is.*
2. *The Establishment thereof by Statute Laws.*
3. *The Oath of the King's Supremacy; when first enacted; the cause thereof.*
4. *The King in his own Dominions, Dei Vicarius.*
5. *The King Supreme Governour (under God) of the Church in England, &c.*
6. *Impugners of the King's Supremacy how censured by the Canon.*
7. *In matters Ecclesiastical the King hath here the same power de jure, which the Pope formerly exercised by Usurpation.*
8. *The Kings of this Realm anciently made their own Canons and Ecclesiastical Constitutions without the Pope's Authority.*
9. *The King is Lex viva, in some cases may dispence with some Canons.*
10. *Provisoers of some Statutes in right of the King's Supremacy.*
11. *No Canons or Ecclesiastical Constitutions to be made, or to be of force to oblige the Subject without the Royal Assent.*
12. *The Regal Supremacy asserted by the Ecclesiastical Injunctions of King Ed. 6.*
13. *The same farther asserted by other Ecclesiastical Power and Authorities.*
14. *The Regal Supremacy asserted in the Reign of Queen Elizabeth.*

(1.) **T**His Ecclesiastical Abridgment begins with the Regal Supremacy, a Point which cannot be touch'd with too much tenderness; such of the Church of Rome as question the validity thereof, may be presumed not to have consulted that Learned Canonist of their own, Jo. Quintinus Hædæus, where he says, *That Nemini dubium, quin in*
Pri-

*Jo. Q. Hed Primitiva Ecclesia de rebus & Personis Ecclesiasticis Principes jui dix-
Repet. in c. erint.* The Emperours were all Secular Princes, who by those
Novit. De Ju Laws which they established touching Persons and Things Eccle-
dic. nu. 145. siastical, proclaimed to all the World their Supremacy therein :
 The Thirteen First Titles of the First Book of the Emperour
Justinian's Code, being the Constitutions of divers Emperours,
 do treat and judge of Things and Persons merely Ecclesiastical ;
 yea, the Emperours *Arcadius* and *Honorius* ejected a Bishop as
 well out of his Title of Ecclesiastical Dignity as out of his *Epi-*
scopal See, and commanded him to be Banished for disturbing the
 Publick Peace. *l. quicumque, C. de Episc. & Cleric.* By this word
 [Supremacy] is here understood, that undoubted Right and an-
 cient Jurisdiction over the State Ecclesiastical within these his
 Majestie's Realms and Dominions (with the abolishing of all Fo-
 reign and Usurped power repugnant to the same) which the Laws
 and Statutes have restored to the Crown of this Kingdom, and
 now invested in the King, as the highest power under God, with-
 in these his Majestie's Realms and Dominions, unto whom all
 persons within the same, in all Causes and Matters, as well Ec-
 clesiastical as Temporal, do owe their Loyalty and Obedience,
 before and above all other Powers and Potentates on Earth
 whatever.

*Vid. B. Spar.
Collect. Edit.
1675.*

(2.) By the Injunctions of King *Ed. 6.* to the Clergy, all per-
 sons Ecclesiastical having cure of Souls, were Four times a year
 to preach in vindication of the King's Supremacy, and in
 opposition to the usurped power of the Bishop of *Rome* in this
 Kingdom. There were divers Laws made in the time of King
H. 8. for the extinguishment of all Foreign Power, and for the
 restoring unto the Crown of this Realm the ancient Rights and
 Jurisdictions of the same; which is the substance of the Preamble

(a) *Co. Infl.
p. 4. c. 74.*

of the Statute of *1 Eliz. cap. 1.* The express Letter and
 meaning whereof is, as Sir *Edward Coke* observes², to restore
 and unite to the Crown the Ancient Jurisdiction Spiritual or
 Ecclesiastical, where (as says he) the First clause of the Body
 of the Act, being to let in the Restitution of the Ancient
 Right and Jurisdiction Ecclesiastical within the Realm, doth
 abolish all Foreign Jurisdiction out of the Realm. And then
 followeth the principal Clause of Restitution and uniting of
 the ancient Jurisdiction Ecclesiastical, being the main purpose
 of the Act, in these words, *viz. Be it Enacted, That such*
Jurisdiction Spiritual or Ecclesiastical, as by any Spiritual
Power or Authority hath heretofore been, or lawfully may
be exercised or used for the visitation of the Ecclesiastical State
and Persons, and for Reformation, Order, and Correction of
the

the same, and of all manner of Errours, Heresies, Schisms, Abuses, Offences, Contempts and Enormities, shall for ever by Authority of this Parliament, be united and annexed to the Imperial Crown of this Realm. This Act by a former Clause thereof doth Repeal the Statute of 1 and 2 Ph. & Ma. c. 8. whereby the Acts of 26 H. 8. c. 1. and 35 H. 8. c. 3. were repealed; so that the Act of Repeal being repealed, the said Acts of H. 8. were implicitly revived, whereby it is declared and enacted, That the King his Heirs and Successours, should be taken and accepted the onely Supreme Head in Earth of the Church of England, and should have and enjoy, annexed to the Imperial Crown of this Realm, as well the Title and style thereof, as all Honours, Dignities, Prebeminencies, Jurisdictions, &c. to the said dignity of Supreme Head belonging, &c. By which Style Title and Dignity the King hath all Ecclesiastical Jurisdiction whatever^b; and by which Statute the Crown was but remitted and restored to its ancient Jurisdiction, which had been formerly usurped by the Bishop of Rome^c. And this is that Supremacy which is here meant and intended.

Co. Ibid.

Davis 1.
Proxies 4.

(3.) The said Statute of 1 Eliz. c. 1. doth not onely repeal the said Stat. of 1 and 2 P. & M. c. 8. but it is also a reviver of divers Acts asserting severall branches of the King's Supremacy, and re-establishing the same; it doth likewise not onely abolish all foreign authority, but also annex the Ecclesiastical Jurisdiction to the Crown of this Realm, with power to assign Commissioners for the exercise of Ecclesiastical Jurisdiction: And then farther enacts to this effect, viz. That all Ecclesiastical persons of what degree soever, and all and every Temporal Judge, Justice, Mayor, or other Lay or Temporal Officer or Minister, and every other person having Fees or wages from the Crown, within this Realm or the Dominions thereof, shall upon his corporal Oath testifie and declare in his conscience, That the King's Majesty is the onely Supreme Governour of this Realm, and of all other his Majesty's Dominions and Countries, as well in all Spiritual or Ecclesiastical things or causes, as Temporal; and that no foreign Prince, Person, Prelate, State or Potentate hath or ought to have any jurisdiction, power, superiority, prebeminence or authority, Ecclesiastical or Spiritual, within this Realm; and therefore doth utterly renounce and forsake all foreign jurisdictions, powers superiorities and authorities; and doth promise that from henceforth he shall bear Faith and true Allegiance to the King's Majesty, his Heirs and lawfull Successours, and to his power shall assist and defend all jurisdictions, privileges, prebeminencies and authorities granted or belonging to the King's Majesty, his Heirs and Successours, or united or annexed to the imperial Crown of this Realm. The practices of the Romanists in the 4th year of Queen Elizabeth, and the danger thereby threatening both the Queen and State, occasioned her to call

By virtue
hereof were
the Letters
Patent of the
High Commis-
sion Court.

a Parliament 12. Jan. An. 156 $\frac{1}{2}$, which passed an Act *For assurance of the Queen's Royal power over all Estates and Subjects within her Dominions*. By which Statute was enacted the Oath of Supremacy; as also what persons were obliged to take it, and who should have power to administer the same: And this was both the original and the cause of that Oath. By the said Statute of 1 El. c. 1. appears also what the penalty is for refusing to take the said Oath; as also the penalty of maintaining a foreign Authority, as likewise what other persons than the fore-mentioned shall be obliged to take the said Oath; which was afterwards again farther ratified and established by the Statute of 5 Eliz. c. 1.

(4.) The King within his own Territories and Dominions, is (according to Bracton) *Dei Vicarius tam in Spiritualibus quam Temporalibus*^d. And in the Ecclesiastical Laws of Edward the Confessor the King is styled, *Vicarius summi Regis, & Reges regunt Ecclesiam Dei*, in immediate subordination to God^e: Yea the Pope himself, *Elutherius*, An. 169. styled King *Lucius, Dei Vicarius in Regno suo*^f.

(5.) The Supremacy which heretofore the Pope did usurp in this Kingdom was in the Crown originally, to which it is now legally reverted. The King's Supremacy in and over all Persons and Causes Ecclesiastical, within his own Dominions, is essentially inherent in him; so that all such Authority as the Pope here once usurped, claiming as supreme Head, did originally and legally belong to the Crown, and is now re-united to it by several Statutes as aforesaid^g. On this Supremacy of the King, as supreme Head, Sir Edward Coke grounds the power of granting a Commission of Review after a definitive Sentence in the *Delegates*^h, for one reason that he gives, is, because after a definitive Sentence the Pope, as supreme Head by the Canon Law, used to grant a Commission *ad Revidendum*: And such Authority as the Pope had, claiming as supreme Head, doth of right belong to the Crown; *Quia sicut Fontes communicant aquas fluminibus cumulativè, non privativè: sic Rex subditis suis jurisdictionem communicat in Causis Ecclesiasticis (vigore Statuti in hujusmodi Casu editi) cumulativè, non privativè*ⁱ.

^g 26 H. 8. 1.
^h 1 El. 1. § El. 1.
vid Co. instit.
p. 4. c. 74.
ⁱ Co. ubi sup.
de Com. ad
Revid.

(6.) By the Second Canon of the Ecclesiastical Constitutions of the Church of England it is ordained, That whoever shall affirm, that the King's Majesty hath not the same authority in Causes Ecclesiastical, that the godly Kings had among the *Jews*, and Christian Emperours in the primitive Church, or impeach in any part his Regal Supremacy in the said Cases restored to the Crown, and by the Laws of this Realm therein established; shall be excommunicated *ipso facto*, and not be restored but onely by the Archbishop after his repentance and publick revocation of those his wicked Errors.

(7.) The

(7.) The King being next under God supreme Governour of the Church of England, may *Qua talis* redress as he shall see cause, in all matters of Spiritual and Ecclesiastical jurisdiction for the conservation of the Peace and Tranquillity of his Realms^k. The Pope, as appears by the Stat. of 25 H. 8. c. 21. claim'd full power to dispense with all humane Laws of all Realms in all Causes, which he called Spiritual: Now the King as supreme hath the same power in himself within his own Realms legally, which the Pope claimed and exercised by usurpation. *Eadem præsunt mens Regis, quæ est Juris*. The King's immediate, personal, ordinary, inherent power, which he executes or may execute *Authoritate Regia suprema Ecclesiastica*, as King and supreme Governour of the Church of England, is one of these Flowers *qui faciunt Coronam*^l. Nor is the King's immediate power restrained by such Statutes as authorize inferior persons: The Lord Chief Justice *Hobart* asserts, That although the Stat. of 25 H. 8. 21. doth say, That all Dispensations, &c. shall be granted in manner and form following, and not otherwise, yet the King is not thereby restrained, but his power remains full and perfect as before, and he may still grant them as King; for that all Acts of Grace and Justice flow from him^m. By the Eighth Canon *Concilii Calchuthensis* held under Pope *Adrian* the first, An. 787. the Pope had power to grant what immunities and privileges he pleased in Church-matters, and they were by the said Canon to be duly observed: Whatever authority the Pope pretended to in this Kingdom in such matters by way of Usurpation, the same may the King, as supreme Governour of the Church next under God in his own Dominions, use and lawfully exercise by his Regal authority, *ex justa plenitudine Potestatis suæ*. Likewise Pope *Agathon*, An. 680. in *Concilio Romano-Britannico*, exercised his Papal authority, in the time of *Lotharius* King of *Rent*, not onely touching the Reformation of Errours and Heresies then in this Church, but also as to the compofure of differences and dissensions that then were among the Clergy of this Realm. Such Precedents of the usurped power of the Papal See exercised in this Kingdom, are now of no farther use, than to illustrate or exemplifie the Legal power inherent in the Kings of this Realm in such matters of Ecclesiastical jurisdiction; for the most high and sacred Order of Kings being of Divine Right, it follows that all persons of what estate soever, and all causes of what quality soever, whether Ecclesiastical or Civil, within his Majesty's Realms and Dominions, are subordinated to the Power and Authority of the King as supreme. It is not onely acknowledged, but also constituted by way of an Ecclesiastical Canon, That the power of calling and dissolving Councils both National and Provincial, is the true Right of all Christian Kings within their own Realms and Territories.

^k Vid. Stat. supradict.

^l Colt and Glover against the Bishop of Coventry and Lichfield. Hob. Rep.

^m Ibid.

ⁿ Concil. Calchuth. c. 8. Spelm.

^o Can. 1. of the Synod held at London. An. 1540.

(8) The Ecclesiastical Legislative power was ever in the Kings of this Realm within their own Dominions; That in ancient times they made their own Ecclesiastical Laws, Canons and Constitutions, appears by several Presidents and Records of very great antiquity, which were received and observed within their own Territories without any Ratification from any Foreign power. One instance (among many) may be given of the Ecclesiastical Laws of *Alured Mag. Regis Anglorum*, An. 887. This they did *de jure*, by virtue of their own inherent Supremacy. And therefore when Pope *Nicholas* the Second, An. 1066. in the Bull wherein he ordained *Westminster* to be the place for the Consecrations of Kings, gave power to *Edward* the Confessor and his Successours, to constitute such Laws in the Church, as he should think fit, he gave him therein no more than was his own before: For the Kings of England might ordain or repeal what Canons they thought fit within their own Dominions in right of their Regal Supremacy, the same being inherent in them *Jure Divino, non Papali*. For we find that in King *Etheldred's* days, An. 1009. in *Consilio Eboracensi Generali*, the Canons then made, and afterwards caused by King *Canutus* to be transcribed, were called the King's Canons, not the Bishops, *En hujus Consilii Canones, quos in suas Leges passim transcripsit Rex Canutus, Malmsburius Etheldredo Regi, non Episcopis, tribuit*. And the Peers of this Realm *per Synodum Landavensem* were unexcommunicable, *nisi prius consulto Rege, aut ejus Præcepto*. Which is a plain demonstration, that the Kings of England Anciently had the Supremacy and superintendent Ecclesiastical Power and Jurisdiction inherent in themselves exclusively to all other, either home or foreign powers whatever.

Circa An.
560.

(9.) It is by good Authority asserted, That the King as *Supreme*, is himself instead of the whole Law, yea, that he is the Law it self, and the onely chief interpreter thereof, as in whose Breast resides the whole knowledge of the same, and that his Majesty by communicating his Authority to his Judge to expound the Laws, doth not thereby abdicate the same from himself, but that he may assume it again unto him, when and as oft as he pleases. Dr. *Ridley*, p. 2. c. 1. Sect. 7. Consonant whereunto is that which *Borellus* hath, *Principum Placita Legis habent vigorem, & eatenus vim Legis obtinebunt, quatenus fuerint cum honestate conjuncta*. Borel. *de Magist.* Edit. l. 2. c. 4. & *Roland. à Val. Conf.* 91. nu. 54. vo. 2. And *Suarez* tells us, That *Princeps est Lex viva, & reipsa præcipit, ut Lex per scripturam*. Of which opinion is *Alexander, Imola*, and many others. *Suar. Alleg.* 9. nu. 13. The grant of Dispensations is a peculiar and very considerable part of Ecclesiastical Jurisdiction, the which is eminently in the Crown, and by the Stat. of 25 H. 8. the Archbishop

bishop of Canterbury may grant Dispensations: *Archiepiscopus possit dispensare contra Statutum Provinciale per se edictum; Et qui potest jus condere, potest illud tollere.* Linw. de Cler. Conju. c. 2. gl. ult. Extr. de Elect. c. Significasti, &c. Intonuit. And in another place, *Episcopus in quibusdam casibus dispensare potest contra Canones.* Const. Otho. de Cler. gl. ver. Meritis.

(10.) The Laws and Statutes of this Realm have been tender of the King's Supremacy ever since the Foreign power over the State Ecclesiastical was abolished; In the Statute of 13 Car. 2. cap. 12. there is a *Proviso*, That nothing in the said Act shall extend to abridge or diminish the King's Majesty's Supremacy in Ecclesiastical matters and affairs. And in the Stat. of 22 Car. 2. cap. 1. there is a *Proviso*, That not any thing therein contained shall extend to invalidate or avoid his Majesties Supremacy in Ecclesiastical affairs, but that his Majesty, his Heirs and Successours, may from time to time, and at all times hereafter, exercise and enjoy all Powers and Authority in Ecclesiastical affairs, as fully and amply as any of his Predecessours have or might have done.

(11.) As no Convocations for Ecclesiastical Constitutions, or for correction or reformation of Abuses in the Church, can be conven'd without his Majesty's Writ for that end and purpose: so being conven'd, no Canons or Constitutions that shall then be agreed on, can have any effect in Law, or be in force to oblige any of his Majesty's Subjects untill his consent thereunto be first had and obtained, and untill they shall have the power of Ecclesiastical Laws; by being ratified and confirmed by the supreme Authority. Therefore the Archbishop of Canterbury may not hold a Council for his Province without the King's leave; for when such Council was held by Hubert Archbishop of Canterbury, it was prohibited by Fitz-Peter, Chief Justice, for that he had not the King's License therein, but he would not obey. And 13 Ed. 1. Rot. Parl. M. 1. there was a Writ for a Convocation of the Clergy of the Province of Canterbury and Pauls; and another for the other of York, vid. Stat. 25. H. 8. c. 19. where the Clergy of England acknowledge that the Convocations of the same Clergy are and always have been and ought to be assembled only by the King's Writ. The Convocation is under the power and authority of the King. 2 E. 3. 45. b. Never used to be held but by Sovereign permittance, Hoveden. Speed 538, 12.

(12.) After the Reign of King H. 8. this Supremacy in the Crown was signally exercised by King Ed. 6. styling himself Supreme Head (under Christ) of the Church of England and Ireland, in the Preface of his Injunctions, given as well to all the Clergy as Laity of this Realm; the Close whereof is as followeth, viz. *All which singular Injunctions the King's Majesty ministrerh unto his Clergy and their Successours, and to all his loving Subjects, faithfully charging*

charging and commanding them to observe and keep the same, upon pain of Deprivation, Sequestration of Fruits or Benefices, Suspension, Excommunication, and such other Coercion, as to Ordinaries or others, having Ecclesiastical jurisdiction, whom his Majesty hath appointed for the due execution of the same, shall be seen convenient: Charging and commanding them to see these Injunctions observed and kept of all persons, being under their jurisdiction, as they will answer to his Majesty for the contrary; And his Majesty's pleasure is, That every Justice of Peace (being required) shall assist the Ordinaries and every of them for the due execution of the said Injunctions.

Vid. the Injunctions in Bishop Sparrow's Collect. of Articles.

(13.) The Three first Articles to be enquired of at the Visitations within the Province of Canterbury in the second year of the Reign of the said King Edward the Sixth, were as followeth, viz. (1.) Whether Parsons, Vicars and Curates, and every of them have purely and sincerely, without colour or dissimulation, four times in the year at the least, preached against the usurped Power, pretended Authority and Jurisdiction of the Bishop of Rome? (2.) Whether they have preached and declared likewise four times in the year at least, that the King's Majesty's power, authority and preheminance, within his Realms and Dominions, is the highest power under God? (3.) Whether any person hath by writing, cyphering, preaching or teaching, deed or act obstinately holden, and stand with to extoll, set forth, maintain or defend the authority, jurisdiction or power of the Bishop of Rome, or of his See heretofore claimed and usurped, or by any pretence obstinately or maliciously invented any thing for the extolling of the same, or any part thereof? Likewise by the Articles of Religion, agreed on by the Convocation held at London, and published An. 1553. by the Authority of King Ed. 6. it is declared, *That the King of England, is Supreme Head in Earth next under Christ of the Church of England, &c. and that the Bishop of Rome hath no jurisdiction in this Realm.* The like you have in the Articles of Religion agreed on by the Archbishops and Bishops of both Provinces, and the whole Clergy in the Convocation held in London, An. 1562. and published by the Authority of Queen Elizabeth. *That the Queen's Majesty hath the chief Power in this Realm of England, and other her Dominions, unto whom the chief Government of all Estates of this Realm, whether they be Ecclesiastical or Civil, in all Causes doth appertain, and is not, nor ought to be subject to any foreign Jurisdiction.* Which Articles (being the Articles of the Church of England) were afterwards ratified and confirmed by his Majesty, King CHARLES 1. of ever blessed Memory, by his Royal Declaration thereunto prefixed, in which Declaration you have as followeth, viz. *That we are Supreme Governour of the Church of England, and that*

Bishop Sparrow's Collect. ubi sup. p. 29.

Art. 37.

that if any difference rise about the external Policy, concerning the Injunctions, Canons, or other Constitutions whatsoever thereto belonging, the Clergy in their Convocations to order and settle them, having first obtained leave under Our Broad Seal so to doe: and We approving their said Ordinances and Constitutions, provided that none be made contrary to the Laws and Customs of the Land. Likewise in the first of the aforesaid Injunctions of King Ed. 6. as also in the first of the Injunctions given by Q. Elizabeth, concerning both the Clergy and Laity of this Realm, published An. 1559. being the first year of her Reign, it is enjoyned, that all Deans, Archdeacons, Parsons, Vicars, and all other Ecclesiastical persons, shall faithfully keep and observe, &c. all and singular Laws and Statutes made for the restoring to the Crown, the ancient jurisdiction over the State Ecclesiastical, and abolishing of all foreign power repugnant to the same, &c. By the Statute of 25 H. 8. c. 19. Appeals to Rome are prohibited; and it is ordained, that in default of Justice in any of the Courts of the Archbishops of this Realm, it shall be lawfull to appeal to the King in his Court of Chancery, and thereupon a Commission shall be granted, &c. And by a Proviso towards the end of that Statute an Appeal is given to the King in Chancery upon Sentences in places exempt, in the same manner as was before used to the See of Rome. And as by the said Statute there may be an Appeal to the King in Chancery, when the Suit is in the Archbishops Court, or some Peculiar exempt: so in some cases the Appeal may be to the King generally as he is supreme Head of all Ecclesiastical jurisdiction within the Realm; for by the Statutes made in the time of King Hen. 8. the Crown was onely remitted and restored to its ancient jurisdiction, which had been usurped by the Bishop of Rome: 33 Ed. 3. Fitz. Aid del Roy 103, *Reges sacro oleo uncti Spiritualis jurisdictionis sunt capaces. Rex est mixta persona cum Sacerdote. Et causa spiritualis committi potest Principi Laico. Cassan. in Catal. glo. mund. p. 5. Confid. 24.* The King of England &c. is *Persona sacra & mixta cum Sacerdote*, and at his Coronation, by a solemn Consecration and Unction becomes a Spiritual person, Sacred and Ecclesiastical, and then hath *eam Vestem Dalmaticam*, as an emblem of his Royal Priesthood, *quam Coronam Regni* in respect of the Regal power in Temporals, and is supreme Governour in all Causes and over all Persons, as well Ecclesiastical as Civil. The King is supreme Ordinary by the ancient Common Law of England, before the Statute of 24 H. 8. c. 12. for a Resignation might be made to him^a; he might make a Grant of a Church to a man to hold to his own proper use; ^b he might not onely exempt any Ecclesiastical person out of the jurisdiction of the Ordinary, ^c but also give him Episcopal jurisdiction; he might present to free Chapels (in default of the Dean) by lapse, and that as ^d 1 H. 7. 23.

Ordi-

vid. Roll. Ab.
ver. Preroga-
tiv. Lit.
G. 232.

^a 19 El. 40. 8.
^b 7 E. 3.
Fitz. Q. Imp.
19. vid. 29 E.
3. 9.
^c 1 H. 7. 23.

Ordinary, and in respect of his Supreme Ecclesiastical Jurisdiction; ^d he might dispense with one not lawfully born, to be a Priest, ^e albeit the Ecclesiastical Laws allowed within this Realm do prohibit it; but the reason is, for that it is not *Malum in se*, but *Malum prohibitum*. In a word. All that the Pope was wont to doe in such cases within this Realm, as Provisions, ^f Appeals to Rome, ^g holding Plea of Spiritual things thence arising ^h, Excommunications by his Bulls; and the like, were no other than Usurpations and Encroachments on the Dignity and Prerogative Royal.

(14.) In the Reign of King *H. 8.* *An. 1539.* the Abbats of *Colchester, Reading, and Glastonbury*, were condemned and executed under colour (so the Authour expresse it) of denying the King's Supremacy; and their rich Abbies seized on, as Confiscations to the use of the King: But when the Act of Supremacy came to be debated in the time of Queen *Elizabeth*, it seemed a thing strange in Nature and Polity, That a Woman should be declared to be the supreme Head on Earth of the Church of England; but the Reformed party not so much contending about Words and Phrases, as aiming to oust the Pope of all authority within these Dominions, fixed the supreme power over all Persons and Estates, of what rank soever, in the Crown Imperial, not by the Name of *Supreme Head*, but tantamount, of the *Supreme Governess*. In Queen *Mary's* time there was an Act of Parliament made, declaring, *That the Regal power was in the Queen's Majesty as fully as it had been in any of her Predecessours.* In the body whereof it is expressed and declared, *That the Law of this Realm is, and ever hath been, and ought to be understood, That the Kingly or Regal Office of the Realm, and all Dignities, Prerogatives Royal, Power, Preheminences, Privileges, Authorities and Jurisdictions thereunto annexed, united or belonging, being invested either in Male or Female, are, be, and ought to be, as fully, wholly, absolutely and entirely deemed, adjudged, accepted, invested and taken in the one as in the other.* So that whatsoever Statute or Law doth limit or appoint, that the King of this Realm may, or shall have, execute and doe, any thing as King, &c. the same the Queen (being Supreme Governess, Possessor and Inheritor to the Imperial Crown of this Realm) may by the same power have and execute, to all intents, constructions and purposes, without doubt, ambiguity, question or scruple, any Custome, Use, or any other thing to the contrary notwithstanding. By the tenour of which Act made in Queen *Mary's* Reign is granted to Queen *Elizabeth* as much authority in all the Church-concernments, as had been exercised and enjoyed by *K. H. 8.* and *K. Ed. 6.* according to any Act or Acts of Parliament in their several times. Which Acts of Parliament (as our learned Lawyers on these occasions have declared)

were

^a 27 E. 3. 84.

F.N.B. 34. f.

^c 11 H. 7. 12.^f 19 E. 3.Fitz. *Quare**non admittit*, 7.

vid. Stat. 25

E. 3. De Pro-

visoribus.

^g Vid. Pre-

amble of the

Stat. of 24 H.

8. c. 12.

^h 9 E. 4. 3.

F.N.B. 44. h.

ⁱ 30. Aff. pl.

19.

^k Dr. Heylin's

Hist. Eccl. Re-

staurat. p. 10.

were not to be considered as *Introductory* of a new power, which was not in the Crown before, but only *Declaratory* of an old, which naturally belonged to all Christian Princes, and amongst others to the Kings and Queens of the Realm of England. And whereas some Seditious persons had dispersed a rumour, that by the Act for recognizing the Queen's Supremacy, there was something farther ascribed unto the Queen, her Heirs and Successours, (*viz.*) a power of administering Divine Service in the Church; which neither by any equity or true sense of the words could from thence be gathered, she thereupon makes a Declaration to all her Subjects, *That nothing was, or could be meant or intended by the said Act, than was acknowledged to be due to King H. 8. and King Ed. 6.* And farther declared, *That she neither doth nor will challenge any other Authority by the same, than was challenged and lately used by the said Two Kings, and was of Ancient time due unto the Imperial Crown of this Realm, that is, under God to have the Sovereignty and Rule over all persons born within her Realms and Dominions, of what estate (either Ecclesiastical or Temporal) soever they be, so as no other Foreign Power shall, or ought to have any Superiority over them.* Which Declaration published in the Queen's Injunctions, An. 1559. not giving that general satisfaction to that groundless Cavil, as was expected and intended; the Bishops and Clergy in their Convocation of the year 1562. by the Queen's Authority and Consent, declared more plainly, *viz.* *That they gave not to their Princes by virtue of the said Act or otherwise, either the ministering of God's Word or Sacraments; but that only Prerogative which they saw to have been given always to all godly Princes in holy Scripture by God himself; that is to say, that they should Rule all Estates and Degrees committed to their charge by God, whether they be Ecclesiastical or Temporal, and restrain with the Civil Sword the stubborn and evil doers.* And lastly, to conclude this tender point, There is in the said Act, for the better exercising and enjoying of the Jurisdiction thus recognized to the Crown, an Oath (as aforesaid) for the acknowledgment and defence of this Supremacy, not only in the Queen, but also her Heirs and Successours. Likewise a power given to the Queen, her Heirs and Successours, by Letters Patents under the Great Seal of England, *To Assign and Authorize, &c.* as she and they shall think fit, *Such Persons being natural born Subjects, to exercise, use and occupy under her and them, all manner of Jurisdictions, Privileges and Preeminencies in any wise touching or concerning any Spiritual or Ecclesiastical Jurisdiction within the Realm of England or Ireland, or any other her Highnesses Dominions or Countreys, and to visit, reform, repress, order, correct and amend all such Errors, Heresies, Schismes, abuses, Offences, Contempts and Enormities whatsoever, which by any manner of Spiritual or*

Eccle-

Matthæus Dr.
Heylln, ubi
supra, p. 280,
281, 282.

Ecclesiastical Power, Authority or Jurisdiction, or can or may lawfully be reformed, ordered, redressed, corrected, restrained, or amended to the pleasure of Almighty God, &c. This was the Foundation of the High-Commission Court, and from hence issued that Commission, by which the Queen's Ministers proceeded in their Visitation, in the First Year of Her Majesty's Reign.

CHAP. II.

Of Archbishops.

1. *A Description of that Dignity here in England; the Antiquity, Precedency, Privileges and Style of the Archbishop of Canterbury; with the Precincts of that See.*
2. *The Antiquity, Precedency and Style of the Archbishop of York, with the Precincts of that See.*
3. *What difference between Archbishop and Metropolitan; and why called Metropolitan.*
4. *Three Archbishops in England and Wales, anciently.*
5. *The vicissitudes of the Christian Religion anciently in this Island of Great Britain.*
6. *How the Third Archbishop came to be lost.*
7. *The great Antiquity of an Archbishop in London.*
8. *The Original of the Style, Primate and Metropolitan.*
9. *What the difference anciently between the two Archbishopricks of Canterbury and York; certain Privileges of the latter.*
10. *Whether an Archbishop may call Cases to his own cognizance, nobile Ordinario.*
11. *In what Case the Clerk is to be instituted by the Archbishop, where the Inferiour Ordinary hath right to collate; also his power of Dispensations.*
12. *A Case at Common Law, relating to the Archbishop's Jurisdiction.*
13. *Certain special Privileges of the Archbishop of Canterbury.*

Dicuntur Pa-
tres propter
honores suis ex-
hibendos.

(1.) **A**RCHBISHOP [*ab archos, Princeps, & Episcopus, Superintendens.*] is that Spiritual Person Secular, who within that Province whereof he is Archbishop, hath next and immediately under the King, Supreme Power, Authority and Jurisdiction in all causes and things Ecclesiastical. Of such there are onely two in England; one of the Province of Canterbury, styled *Metropolitanus & Primas Totius Angliæ*; the other of York, styled *Primas & Metropolitanus Angliæ*. Under the two Archbishops are

twenty

twenty six Bishopricks, whereof twenty two in the Province of *Canterbury*, and four in the Province of *York*: so that besides the two Archbishops, there are twenty four Bishops. The Christian Religion in *England* took root first in the See of *Canterbury*; *Saint Austin*, who first preached the Gospel to the *one*, was the first Archbishop of the *other*. *Canterbury*, once the Royal City of the Kings of *Kent*, was by King *Eshelbert*, on his Conversion, bestowed on *Saint Austin* the Archbishop and his Successours for ever; and so the Chair thereof became originally fixed in that City of *Canterbury*; *Cantuarienses Archiepiscopi*, *Dorovernenses antiquitus dicti sunt: quia totius Anglicanæ Ecclesiæ Primates & Metropolitani fuerunt*. The Archbishop whereof, being styled *Primate and Metropolitan of all England*, is the first Peer of the Realm, and hath Precedency, not onely before all the Clergy of the Kingdom of *England*, but also (next and immediately after the *Blond Royal*) before all the Nobility of the Realm. *Sr. Edward Coke* says more, and lets us to understand, That in ancient time they had great Precedency, even before the Brother of the King ^a; as appears by the Parliament Roll of 18 E. 1. and many others, which continued untill it was altered by Ordinance in Parliament in the Reign of *H. 6.* as appears by a Roll of Parliament of that King's Reign; entred in the back of the Parliament Roll. The Precedency in Parliament and other places of Council at this day is, That the Two Archbishops have the Precedency of all the Lords Temporal; and every other Bishop in respect of his Barony, hath place of all the Barons of the Realm, and under the Estate of Viscount and other Superiour Dignities; And at this day, in all Acts, Ordinances and Judgments, &c. of Parliament, it is said the Lords Spiritual and Temporal. The Bishops (among themselves) have this Precedency, (1.) The Bishop of *London*, (2.) The Bishop of *Duresme*, (3.) The Bishop of *Winchester* ^b. The Archbishop of *Canterbury*, as he hath the Precedency of all the Nobility, so also of all the great Officers of State. He writes himself *Divina Providentia*, whereas other Bishops onely use *Divina Permissio*. The Coronation of the Kings of *England* belongs to the Archbishop of *Canterbury*, and it hath been formerly resolved, that wheresoever the Court was, the King and Queen were *Speciales & Domestici Parochiani Domini Archiepiscopi*. He had also heretofore this Privilege of special remark, That such as held Lands of him, were liable for *Wardship* to him, and to compound with him for the same, albeit they held other Lands in Chief of our Sovereign Lord the King ^d. All the Bishopricks in *England*, (except *Duresme*, *Carlisle*, *Chester*, and the *Isle of Man*, which are of the Province of *York*) are within the Province of *Canterbury* ^e. The Archbishop whereof hath also

Ant. Brit. in prin.

Co. Inf. par. 4. cap. 77. in fin.

page 364

Co. ibid.

He is styled in the King's Writs directed to him, Dei gratia, Archiepiscopo Cantuariensi.

a Dr. Heylin's Help to Hist. verb. Canterbury.

e Co. Inf. par. 4. c. 74.

(3.) It hath been question'd, whether there be any difference between *Archbishop* and *Metropolitan*; the D D. herein seem to be divided, some conceiving that there is some difference between them, others affirming that they are both one; the *Canon Law* seems in a sense to favour each of these Opinions, saying in one place, that the Archbishop as President hath the charge and oversight of the Metropolitans and other Bishops, 21. *Dist. Cleros*. In another place, that Archbishop and Metropolitan are but one and the same indeed and in truth, although they differ in name. *Wilhel. in Clem. ult. de Privileg. verb. Archiepiscopo vers. fin. Metropolitanus & Archiepiscopus idem sunt. Sed Metropolitanus nomen trahit à numero Ecclesiarum, viz. à [metro] mensura, & [polis] Civitatis*, *Otho. glo. in verb. Archiepiscopus, De Offic. Archiepisc.* He is called *Archiepiscopus, quasi Princeps Episcoporum*, in respect of the other Bishops whereof he is chief: and *Metropolitanus* in respect of the number of the Cities or Cathedral Churches where the Bishopsricks are. *Lind. ubi supr. gl. ib. ver. Metropolitanum*. For the word [*Civitas*] doth signifie with us, as it doth in other Kingdoms, such a Town Corporate as hath a Bishop and a Cathedral Church. Yet *Crompton*, in his *Jurisdictions*, in his Computation of our Cities, doth omit *Ely*, though it hath a Bishop and a Cathedral Church. Thus *Westminster* is called a *City*, and accordingly there is mention made of a Bishop of *Westminster* in a Statute *St. 35. El.* made during the Reign of King *Henry 8.* But by Letters Patents, *c. 6.* dated 21 *May, 2 Eliz.* (in pursuance of an Act of Parliament of *St. 35 H. 8.* *Eliz.* not printed) the Revenues of that late Monastery were vested in the Dean and Chapter of the Collegiate Church of *Westminster*, which hath caused Errours in the Pleadings of some Cases by styling it the *Cathedral*, for *Collegiate Church of Westminster*. *Cassanau*, who wrote as well *De Gloria Mundi* in general, as of *Cassan. de Consuet. Burgund.* the Customes of *Burgundy* in particular, saith, That *France* hath within its Territories 104 Cities, and gives this Reason, because pag. 15. there are so many Seats of Archbishops and Bishops. Yet Sir *Edm. Co. Lit. fô. 109. b.* *Coke* observes *Cambridge* to be a City by ancient Record, although it does not evidently appear that it ever was an Episcopal See: And *Mich. 7. R. 1. Rot. 1.* in the Stat. of 11 *H. 7. c. 4.* it is there called the Town of *Cambridge*.

(4.) In *England* and *Wales* there were anciently three Provinces, and over them three Archbishops, whose Archbishopsricks were founded above 1500 years since; For soon after the Conversion of King *Lucius* (who began his Reign over the *Britains*, Anno 170.) being prevailed with to embrace the Christian Faith by the persuasions of *Elvanus*, who had been brought up at *Glastenbury*, and of *Capgr. Hist. Landav.* *Medwanus*, both *Britains* ^b, and therein confirmed by the *Dives*

vines, which *Eleutherius* (who became Pope *An. 177.*) sent into Britain for that end and purpose¹; The said King being by them baptized. the false Religion of the *Druids*, with their Idols, was soon abolished, Heathen Temples purged, and then consecrated to the service and worship of the True God, and in the place of twenty eight *Flamins* were Bishops consecrated, the three Archbishops whereof were founded in the three chief Cities of the then three Provinces, erected by the *Romans*, where *Arch-Flamins* had formerly been maintain'd, viz. at *London*, the Metropolis of *Britannia Prima*: at *York* the Metropolis of *Maxima Caesariensis*; and at *Caerleon* in *Wales*, which is said to be *Caerleon* upon *Uske*, formerly called *Isca* in *Monmouthshire*, the Metropolis or chief City of *Britannia Secunda*, or under *Urbs Legionum, Cambria*². *Gildas*, antiquissimus inter eos, qui fide digni sunt, Britannicarum rerum scriptor, tradit Britannos ab ortu Evangelii Christianam suscepisse fidem. Ant. Brit. ubi supr. Ac primum, Paulum ipsum, cum aliis Gentibus, sum nominatim Britannis, Evangelium nunciassse post priorem suam Romæ incarcerationem. Theodoret. l. 9. de Curand. Græcor. affl. Origines, qui proximis fuit post Apostolos seculis, testatur Britanniam in Christianam consensire Religionem. Orig. Hom. 4. in Ezech. Lucius, Rex Britannæ, An. 179. Baptizatus. Ab Eleutherio, Pontifice Romano, reformationem Angliæ petiit, Episcop. 29. ordinavit. Ant. Brit. fo. 4, 5, 7. Before the coming of the Saxons into England, the Christian Britains had three Archbishops, viz. of London, York and Caerleon in Wales. The Archiepiscopal See of London, was by the Saxons placed at Canterbury for St. Austin's sake, where he was buried. That of Caerleon being translated to St. Davids, and after subjected to the See of Canterbury.

An. 302. (5.) From this time to *Dioclesian's* Persecution (which though the Tenth and last, yet the first which the Britains felt) Christianity flourished in this Island, which by that Persecution was almost extirpated out of the Land, till *Constantine* the Great wore the Imperial Crown, in whose time it revived till the beginning of the next Century, when it was infected with the *Pelagian* Heresie, till the condemnation thereof in the Council of *Carthage* and *Mela*, and happily suppressed by *Germanus* Bishop of *Auxerre*, and by *Lupus* Bishop of *Trois* in *Campeigne*, who at the request of the English Catholics were sent by the French Bishops into England; as at the same time, and for the same end, *Palladius* was by Pope *Celestine* into *Scotland*¹. And now the Christian Religion flourished again, till the time of the usurping Tyrant *Vortiger*, who after he had slain *Vodinus* Archbishop of *London*^m, was himself burnt in a Castle besieged by *Aurelius Ambrose*, having first surrenderedⁿ *Kent, Suffolk and Norfolk* to the Infidel *Hengist*, who with his Saxons almost

¹ Leland. in
Albert. Attur.
fo. 36. a.
Malmsh. Ant.
Brit.
B. Godw. St.
Davids in
Wales.
Sp. fo. 79.
nu. 18.

¹ Prosp. Angl.
Gild. Polyd.
Buch. Hunt.
l. 3.
Bede l. 1.
c. 15.
Polyd. l. 5. Sp.
^m B. Godw.

almost desolated the Land; insomuch that *Theanus*, Bishop of *London*, and *Theodicens*, Bishop of *Tork*, were forced to flee into *Cornwal* and *Wales*, untill *St. Austin's* coming hither (where he then found onely one Archbishop and seven Bishops) being with forty others as Assistants to him, sent hither by Pope *Gregory* to convert the Nation^a; whom *Ethelbert*, King in *Kent*, kindly received, and seated him (as aforesaid) in a Mansion of *Canterbury*, the Metropolis of his Kingdom^c, and assigned him a place to erect a Bishop's See, who afterwards fixed his Seat at *Canterbury*, which ever since hath continued the Metropolis of this Kingdom: And thus *St. Austin*, upon his entrance into *England*, by the favour and bounty of the said King *Ethelbert*, having fixed his Seat at *Canterbury*, the Archbishops thereof have, by a continual Series or Succession, continued as Metropolitans of all *England*.

(6.) And whereas there were (as aforesaid) anciently three Archbishopricks in three distinct Provinces within this Kingdom, whereof that of *Caerleon* upon *Uske* in *Wales* was one, and whereof *Dubritius*, in the Year 466, was Archbishop, who having his Seat at *Landaff*, became for his integrity Archbishop of all *Wales*, and was upon Resignation in his old Age succeeded in the Archbishoprick by his Disciple *David*, Uncle to King *Arthur*^p, by whose consent he removed the See to *Menevia*, of which place he still retaineth the name of *Episcopus Menevensis*, and the Town it self thereupon called *Twy Dewi*, or *St. David's*, as taking its denomination from his Name; yet it afterwards so unhappily happened, that *Sampson*, a succeeding Archbishop, upon a great Plague raging in *Wales*, went to *Dola* in *Little Britain*, and thither carried the Pall with him, whereby Saint *David's* for ever after lost the dignity of an Archbishop. And in the time of *H. 1.* both that See, and the rest in *Wales* became subject to the Archbishop of *Canterbury*, as at this day^q.

(7.) In the time of King *Lucius*, *London* had an Archbishop to whose Jurisdiction at that time the greatest part of *England* was subject; This Archbishop was that *Theanus* forementioned, who was the chief Founder and Builder of *St. Peter's* Church in *Cornhill*, *London*, which was the Cathedral of his Diocese till King *Ethelbert* built *St. Paul's* Church. In this See continued the Dignity of an Archbishop above 180 Years; but by reason of the Saxon Persecution stood void, till that ten years after the coming of *St. Austin*, *Melitus* was consecrated Bishop of that See, and so it continued ever after as a Bishoprick (which in the days of King *Lucius* was an Archbishoprick, as aforesaid) till *St. Austin* in the year 598. took on him the Title of Archbishop of *England*, settling his See at *Canterbury*.

(8.) Upon

^a Bede l. 2.

c. 23.

Hunt. l. 2.

Jo. Dia. in.

vit. Greg.

leg. 2.

^c Bede, l. 1.

c. 25.

An. 596.

An. 519.

^p Cambd.

Bale ex Le-

land. B. Godw.

^q Cambd.

Antiq. Brit.

f. 111.

(8.) Upon the abrogating of the Popes power in England by King H. 8. in the seventh year of his Reiga, it was concluded, that the Archbishop of *Canterbury* should no more be styled the Pope's *Legate*, but *Primate* and *Metropolitan* of all England; at which time *Tho. Crammer*, Fellow of *Jesus-College* in *Cambridge*, who pronounced the Divorce from Queen *Katharine of Spain*, upon his advice given the King to leave the Court of *Rome*, and to require the Opinions of learned Divines, being then in *Germany*, procured such favour with the King, that he caused him to be elected to this See of *Canterbury*, and was afterwards, with the then Bishop of *Durresme*, made Tutor to King *Edward the Sixth*.

* Ant. Brit.

(9.) The Archbishop of *Canterbury* was supposed to have had a concurrent Jurisdiction in the inferior Dioceses within his Province; which is not denied in the Case of *Dr. James*[†], onely it is there said, That was not as he was Archbishop; but as he was *Legatus Natus* to the Pope, as indeed so he was before the time of King H. 8. (as aforesaid) by whom that Power (together with the Pope) was abrogated, and so it ceased; which the Archbishop of

* Case *ibid.*

The Pope

would have

Thurstan

Archbishop of

York, in the

time of H. 1.

right of his Crown

to be installed

contrary to all

Right and

Custom, with-

out professing

any subjection

to the See of

Canterbury.

Speed 440. b.

Mich. 10.

Jac. ro. 2642.

Colt and Glo-

ver vers. Bp.

of Coventry

and Lichfield.

Hob. Rep.

York never had, nor ever claimed^{*}; as appears in the forecited Case, where it is farther said, That when there is a Controversie between the Archbishop and a Bishop touching Jurisdiction, or between other Spiritual Persons, the King is the different Arbitrator in all Jurisdictions as well Spiritual as Temporal, and that is a right of his Crown to distribute to them, that is, to declare their Bounds; Consonant to that which is asserted in a Case of *Commendam*, in *Colt* and *Glover's* Case against the Bishop of *Coventry* and *Lichfield*, where it is declared by the Lord *Hobart* Chief Justice, That the King hath an immediate, personal, originary, inherent Power, which he executes, or may execute, *Authoritate Regia Summa Ecclesiastica*, as King and Sovereign Governour of the Church of *England*, which is one of those Flowers, *qui faciunt Coronam*, which make the Royal Crown and Diadem in force and virtue[†]. The Archbishop of *Canterbury*, as he is *Primate* over All *England*, and *Metropolitan*, hath a Supereminency, and some power even over the Archbishop of *York*; hath (under the King) power to summon him to a national Synod, and *Archiepiscopus Eboracensis venire debet cum Episcopis suis, ad nutum ejus, & ejus Canonicis dispositionibus Obediens existat*. Yet the Archbishop of *York* had anciently not onely divers Bishopricks in the North of *England*, under his Province; but for a long time all the Bishopricks of *Scotland*, untill little more than 200 years since, and untill Pope *Sixtus the Fourth*, An. 1470. created the Bishop of *St. Andrews* Archbishop and Metropolitan of all *Scotland*. He was also *Legatus Natus*, and had the *Legatine* Office and Authority annexed to that

Arch-

Archbishoprick; he hath the honour to Crown the Queen, and to be her perpetual Chaplain: Of the forementioned Diocese of his Province, the Bishop of *Durham* hath a peculiar jurisdiction, and in many things is wholly exempt from the jurisdiction of the Archbishop of *York*; who hath notwithstanding divers Privileges within his Province; which the Archbishop of *Canterbury* hath within his own Province.

(10.) The Archbishop is the Ordinary of the whole Province; yet it is clear, That by the Canon Law he may not, as *Metropolitan*, exercise his jurisdiction over the Subjects of his Suffragan Bishops; but in certain Cases specially allowed in the Law, whereof *Hofstiens* enumerates one and twenty. The jurisdiction of the Archbishop is opened sometimes by himself, *volente Ordinarii*, as in the Case of his Visitation; and sometimes by the party, in default of justice in the Ordinary, as by *Appeal* or *Nullities*. Again, it may sometimes be opened by the Ordinary himself, without the party or Archbishop, as where the Ordinary sends the Cause to the Archbishop; for although the Canon Law restrains the Archbishop to call Causes from the Ordinary, *volente Ordinarii*, save in the said 21 Cases; yet the Law left it in the absolute power of the Ordinary, to send the Cause to the Archbishop absolutely at his will, without assigning any special reason; and the ordinary may consult with the Archbishop at his pleasure without limitation. Notwithstanding which, and albeit the Archbishop be Judge of the whole Province, *tamen Jurisdictio sua est signata, & non aperitur nisi ex causis*. Nor is the Subject hereby to be put to any such trouble as is a grievance; and therefore the Law provides, that *Neminem oportet exire de Provincia ad Provinciam, vel de Civitate ad Civitatem, nisi ad Relationem Judicis, ita ut Actor forum Rei sequatur*.

* *Hofstiens*.
cap. *Pastoralis*
de *Officio*
Ordinarii.

Vid. Case
Jones ver.
Jones, *Hob.*
Rep.

1 *Bald.* *Caus.*
3 *Q.5.* c. pen.
Ex Synod.
Rom.

(11.) If the Archbishop visit his inferiour Bishop, and inhibit him during the Visitation, if the Bishop hath a title to Collate to a Benefice within his Diocese by reason of Lapse, yet he cannot institute his Clerk; but he ought to be presented to the Archbishop, and he is to institute him, by reason that during the inhibition his power of Jurisdiction is suspended. It was a point on a special Verdict in the County of *Lincoln*, and the *Civilians* who argued thereon seemed to agree therein; but the Case was argued upon another point, and that was not resolved. Likewise, by the Statute of 25 *H. 8. c. 21.* the Archbishop of *Canterbury* hath power to give *Faculties* and *Dispensations*, whereby he can (as to *Plurality*) sufficiently now dispense *de jure*, as anciently the Pope did in this Realm *de facto*, before the making of that Statute, whereby it is enacted, That all Licenses and Dispensations (not repugnant to the Law of God) which heretofore were sued for in

1 *Trin.* 13
Car. B. R. *inter*
Dodson &
Lynn.
1 *Intrat.* Tr.
11 Car. Rot.
446. & *Rob.*
Abb. ver.
Presentment,
lit. C. p. 357,
& lit. Z. 357.

the Court of Rome, should be hereafter granted by the Archbishop of Canterbury and his Successors.

(12.) By the Constitutions and Canons Ecclesiastical, Edit. 1603. Can. 94. it is ordained, That no Dean of the Arches, nor Official of the Archbishop's Consistory, shall originally cite or summon any person which dwelleth not within the particular Diocese or peculiar of the said Archbishop, &c. without the Licence of the Diocefan first had and obtained in that behalf, other than in such particular Cases onely, as are expressly excepted and reserved in and by the Statute of 23 H. 8. c. 9. on pain of suspension for three months. In the Case of Lynche against Porter, for a Prohibition upon the said Statute of 23 H. 8. c. 9. it was declared by the Civilians in Court, That they used to cite any Inhabitant of and in London to appear, and make Answer in the Archbishop of Canterbury's high Court of Arches originally: And Dr. Martyn said, It had been so used for the space of 427 years before the making of the Statute; and upon complaint thereof made to the Pope, the Answer was, That any man might be cited to the Arches out of any Diocese in England: Also, That the Archbishop may hold his Consistory in any Diocese within his Jurisdiction and Province: That the Archbishop hath concurrent Jurisdiction in the Diocese of every Bishop, as well as the Archdeacon: And, That the Archbishop of Canterbury prescribes to hold Plea of all persons in England. But as to his power of having a Consistory in the Diocese of every Bishop, this was in this Case denied, but onely where he was the Pope's Legate, whereof there were three sorts: (1.) Legats à Latere, and these were Cardinals, which were sent à Latere from the Pope. (2.) A Legate born, and these were the Archbishops of Canterbury, York and Mentz, &c. (3.) A Legate given, and these have Authority by special Commission from the Pope. Likewise in the Case of Jones against Boyer, C. B. it was also said by Dr. Martyn, That the Archbishop hath ordinary Jurisdiction in all the Dioceses of his Province, and that this is the cause that he may Visit.

^a Brownl.
Rep. p. 2. Case
Linche vers.
Porter.
^c Trin. p. Ja.
C. B. Jones
vers. Boyer.
Brownl. ibid.

(13.) The Archbishop of Canterbury Anciently had Primacy as well over all Ireland as England, from whom the Irish Bishops received their Consecration, for Ireland had no other Archbishop until the year 1152. For which reason it was declared in the time of the Two first Norman Kings, That Canterbury was the Metropolitan Church of England, Scotland and Ireland, and the Isles adjacent: the Archbishop of Canterbury was therefore sometimes styled a Patriarch^d, and Orbis Britannici Pontifex, inso much that Matters recorded in Ecclesiastical Affairs did run thus, viz. Anno Pontificatus

^d Patriarcha
was a chief
Bishop over se-
veral Kingdoms or Provinces (as an Archbishop is of several Dioceses) and had several Archbishops under him.

tus Nostri primo, secundo, &c. He was also *Legatus Natui*, that is, he had a perpetual *Legantine* power annext to his Archbishoprick nigh a thousand years since. And at General Councils he had the Precedency of all other Archbishops abroad, and at home he had some special mark of *Royalty*, as to be the Patron of the Bishoprick, (as he was of *Rochester*) to coin Money, to make Knights, and to have the Wardships of all those who held Lands of him *jure Domini*, although they held in *Capite* other Lands of the Kings, as was formerly hinted. He is said to be *Inthroned*, when he is invested in the Archbishoprick. And by the Stat. of 25 *H. 8.* he hath power to grant *Licenses* and *Dispensations* in all Cases heretofore sued for in the Court of *Rome*, not repugnant to the Law of God or the King's Prerogative: As also, to allow a Clerk to hold a Benefice in *Commendam* or in *Trust*; to allow a Clerk rightly qualified, to hold Two Benefices with Cure of Souls, to allow a Beneficed Clerk, for some certain causes to be *non-resident* for some time, and to *Dispense* in several other Cases prohibited by the Letter of the *Canon Law*. Likewise the Archbishop of *Canterbury* Consecrates other Bishops; confirms the Election of Bishops within his Province, calls provincial Synods according to the King's Writ, to him ever directed; is chief Moderator in the Synods and Convocations; he Visits the whole Province; appoints a *Guardian* of the *Spiritualities* during the vacancy of any Bishoprick within his Province, whereby all the Episcopal Ecclesiastical Rights of that Diocese for that time belong to him; all Ecclesiastical jurisdictions, as Visitations, Institutions, &c. He may retain and qualifie Eight Chaplains, which is more by Two than any Duke is allowed by Statute to doe, and hath power to hold divers Courts of *Judicature*, for the decion of Controversies pertaining to Ecclesiastical cognizance.

C H A P. III.

Of Bishops and Ordinaries.

1. Bishop, Why so called; Nor above One to be in one Diocese.
2. Why called Ordinary; and what the Pallium Episcopale is.
3. Bishopricks originally Donative; Kings of England the Founders thereof.
4. The manner of Election of Bishops; their Confirmation and Consecration.
5. Their Seal of Office; in what cases they may use their own Seals.
6. What follows upon Election, to make them Bishops complete; the grant of their Temporalties.
7. The Conge d'Esleire, and what follows thereupon.
8. Bishopricks were Donative, till the time of King John.
9. What the Interest and Authority is, in his several capacities.
10. Episcopal Authority derived from the Crown.
11. The Use and Office of Suffragan Bishops.
12. Whether a Bishop may give Institution out of his own proper Diocese, and under other Seal than in his own Seal of Office.
13. Several things incident to a Bishop *qua talis*.
14. Ordinary, what properly he is, and why so called.
15. In what cases the Ordinary's Jurisdiction is not merely Local.
16. The Ordinary's power *de jure Patronatus*.
17. Whether the Ordinary may cite a man out of his own Diocese; Also his Right *ad Synodalia*.
18. The Ordinary's power of Visitation.
19. The Dignity and true Precedency of the Bishops in England.
20. Temporal Jurisdiction anciently exercised by Bishops in this Realm; The Statute of 17 Car. 1. against it, Repealed; and they Restored to it by the Stat. of 13 Car. 2. as formerly.
21. The Act made in the Reign of Ed. 6. concerning the Election of Bishops; the endeavours thereby to take away Episcopal Jurisdiction; the Nomination of all Bishops was anciently sole in the King.
22. The Bishops of London are Deans of the Episcopal College.
23. A Case at Common Law, touching a Lease made by one Bishop during the life of another of the same Diocese in Ireland.

Bishop, supposed from the Saxon word *Bæcop*, and that from the Greek *Ἐπισκοπος*, Speculator vel Superintendens.

(1.) **B**ISHOP, *Episcopus*, from *ἐπί*, *supra*, and *σκοπῆν*, *intendere*, an Overseer or Superintendent, so called from that watchfulness, care, charge, and faithfulness, which by his Place and Dignity he hath and oweth to the Church; A word which all anti-

antiquity hath appropriated to signifie the chief in Superintendency over the whole Church within his Diocese, wherein are divers inferior Pastours. This oversight or care the *Hebrews* call *Pekudah*^a. Of this Office or Ecclesiastical Dignity there can be but one at a time in one and the same Diocese; whence it is that *Cornelius* Bishop of *Rome* (as *Eusebius* relates) upbraided *Novatus* for his ignorance in that point^b, when he could not but know there were no less than 46 Presbyters in that Church; *Oecumenius* and *St. Chrysostome* affirming also as many at *Philippi*; For in this restrained sense, as the word [*Bishop*] is now taken, it cannot be imagined that there should be more than one in one City or Diocese at the same time; consonant whereunto the Synod of *Nice* prohibited Two or more Bishops to have their *Seats* at once in the same City. This *Novatus* aforesaid was a Priest of *Rome* 254 years after Christ; he abhorred Second Marriages, and was condemned as an Heretick in a Synod at *Rome* the same year^c. Every Bishop, many Centuries after Christ, was universal Incumbent of his Diocese, received all the Profits, which were but Offerings of Devotion, out of which he paid the Salaries of such as officiated under him, as Deacons and Curates in places appointed^d.

(2.) Under this name or appellation of *Bishops* are contained, Bishops, Primates, Metropolitans, Patriarchs and *Summus Pontifex*. *Dist.* 21. c. 1. And the Presbyters also, *C. Legimus*, §. 1. *Dist.* 93. *Spec. de Instr. Edit. Sect.* 14. *vers. de Episcopo*, and for such commonly used and taken in the New Testament^e: *1. 14. c. de Episc. & Cler.* In some Acts of Parliament we find the Bishop to be called *Ordinary* and so taken at the Common Law, as having ordinary Jurisdiction in Causes Ecclesiastical, albeit in the Civil Law, whence that word [*Ordinarium*] is taken, it signifies any Judge authorized to take Cognizance of Causes *proprio suo jure*, as he is a Magistrate, and not by way of Deputation or Delegation^f. The word [*Ordinary*] doth chiefly take place in a Bishop, and other Superiours, who alone are universal in their jurisdictions; yet under this word are comprised all other Ordinaries, *viz.* such as to whom Ordinary jurisdiction doth of right belong, whether by Privilege or by Custome. *Linw. de Constit. c. Exterior. ver. Ordinarii*. The *Pallium Episcopale*, or Bishop's Pall, mentioned (as *Sir Ed. Coke* observes) in some Statutes, and many Records and Histories, is a Hood of white Wool, to be worn as Doctors Hoods upon the Shoulders, with four Crosses woven into it, &c. for the form and Colours whereof *vid. Antiq. Brit. Eccles. fo. 1.* This *Pallium Episcopale* is the Arms belonging to the See of *Canterbury*^g: *vid. Cassan. de glori. mun. p. 4. fol. 103. a. 26. Confid. ubi multa legas de Pallio.* *Henry Dean*, the 65th Archbishop of *Canterbury*, *An. 1502.* had *Pallium Archiepiscopatus*^h.

^a Num. 3. 32.

^b Euseb. l. 1. Hist. Eccl.

^c Euseb. ib. cap. 42.

^d Seld. Hist. Tithe, c. 6. p. 3. fo. 80. b. & c. 9. p. 2. fo. 253.

^e Phil. 1. 1.

^f Westm. 2.

^g C. 19.

^h 31 E. 3. c. 11.

ⁱ 22 H. 8. 5.

^j Co. Lk. f. 244.

^k Vid. Bed.

^l cit. Ordine.

^m rius.

ⁿ Co. Inst.

^o p. 4. c. 74.

^p vid. 20 H. 8.

^q c. 20.

episcopatus Insigne sent him from Pope *Alexander 6.* by his Secretary *Adrian*; which by the Bishop of *Lichfield* and *Coventry*, Authorized thereto by the Pope, was presented him at *Lambeth* in these words, viz. *Ad honorem Dei Omnipotentis, &c. Tibi tradimus Pallium de Corpore beati Petri sumptum, plenitudinem videlicet Pontificalis Officii, &c.* ^k whereupon he swore Canonical obedience to the Apostolical See of *Rome*.

^k Ant. Brit.
Angl. fo. 302.
nu. 30.

^l Co. p. 5.
Cawdy's Cafe
St. 1 Jac. c. 3.
17 Ed. 3. 40.
By delivery of
a Ring, with
a Crozier or
Pastoral-staff.
Roll Abr. ver.
Presentment,
Adwof. 342.
^m 17 E. 3.
ⁿ 40. b.
ⁿ Ibid.

(3.) The Kings of *England* were anciently the Founders of all the Archbishopricks and Bishopricks in this Realm ^l; and also in *Wales*, the Bishops thereof were originally of the Foundation of the Princes of *Wales*. Bishops in *England* originally were Donative per traditionem Baculi Pastoralis & Annuli, until King *John* by his Charter granted, that they should be Eligible. Chart. 25. Jan. An. Reg. 17. De Communi Consensu Baronum; after which came in the Congé d'Esire. And at this day the Bishopricks in *Ireland* are Donative: Rolls 342. The Patronage of all Bishopricks is in the King, so as that he gives leave to the Chapters to chuse them ^m. In ancient times the King gave the Bishopricks, and then afterwards gave leave to the Chapters to chuse them; as aforesaid ⁿ. The learned Serjeant *Roll*, in that part of his Abridgment touching this Subject makes mention of 1 E. 1. Rot. Clauso Memb. 11. in dorso, where there is this Protestation made by the King, Cum Ecclesia Cathedralis viduatur, & de jure debeat, & soleat de Consuetudine provideri per Electionem Canonicam ab ejusmodi potissimum celebrandam Collegiis, Capitulis & Personis, ad quos jus pertinet, petita tamen prius ab Illustri Rege Angliæ super hoc licentia & obtenta; & demum celebrata Electione, persona electa eidem Regi habeat presentari, ut idem Rex contra personam ipsam possit proponere, si quid rationabile habeat contra eum. And the Protestation goes farther, That in case the Pope make Provision without such Canonical Election, the King shall not be obliged to give him his Temporalities: yet of grace for the time present he gives the Temporalities to the Abbat Elect of *Canterbury* ^o. Thus the Election of Bishops by Deans and Chapters began by the Grant of the King; but the Grant was to elect after License first had and obtained, as appears by the Stat. of 25 Ed. 3. Stat. de Provisoriis. Rastal. 325. d. And King *John* was the first that granted it by his Charter, dated 15 Jan. An. 16. p. *William Rufus* K. after the Archbishop of *Canterbury*'s death, kept the See without an Archbishop for the space of four years, and then assum'd divers other Ecclesiastical Promotions into his own hands that were then vacant, putting to sale divers Rights and Revenues of the Church ^q. But King *H. 1.* made a Law against Reservations of Ecclesiastical Possessions upon vacancies ^r. In the time of *Edward* the Confessor the Prelates used to receive Investiture from the King,

^o Vid. similiter 11 E. 1. Rot. Finium.
M. 5. for the Abbat of St. Augustine of Canterbury, &c. See it there at large.
^p Matth. Par. Hist. Mag. 253. Da. 1.
Dean and Chapter, Ferris, 46. & Præmun. 50.
^q Speed. 428. b.
^r Idem. 453.

King, by giving them the Pastoral Staff and a Ring^t: And so it ^{t Matth. Par.} was used in the time of H. 1. but *Suffragans* were invested onely by the Ring, without the Staff, for that they are not Bishops so fully and completely as the other^t.

(4.) To the Creation of Bishops are requisite, Election, Confir-^{148.} mation, Consecration and Investiture. Upon the vacancy of a See the King grants his License under his Great Seal to the Dean and Chapter of such vacant Cathedral, to proceed to an Election of such a person as by his Letters Missive he shall nominate and appoint to succeed in such vacant Archbishoprick or Bishoprick; which Election must be within twenty days next after their receiving such License or Letters Missive; upon failure whereof they run the danger of a *Premunire*^v. Or if above twelve days after their receipt^{v. Vid. St.} thereof the Election be deferr'd, the King may by his Letters Pa-^{25 H. 8. 20.} tent nominate or present to such vacant Bishoprick, to the Archbi-^{Sec. 3. Rast.} shop or Metropolitan of that Province wherein such See is void; ^{vid. Co. par.} or unto one Archbishop and two other Bishops, or to four such Bi-^{12.} shops as his Majesty shall think fit, in case upon such Nomination or Presentment by the King, the default of Election by the Dean and Chapter to be to the Office and Dignity of a Bishop: Otherwise, if they Elect according to his Majesty's pleasure in his Letters Missive, the Election is good; and upon their Certificate thereof unto his Majesty under their Common Seal, the person so elected is reputed and called *Lord Bishop Elect*; yet is he not hereby complete Bishop to all intents and purposes, for as yet he hath not *Potestatem Jurisdictionis neque Ordinis*, nor can have the same untill his confirmation and Consecration^v; for which reason it is, that if (after^{v Mich. 22.} such Election and before Consecration) a Writ of Right be brought ^{Jac. Latch.} in the Court of a Manor belonging to such Bishoprick; it is not ^{Rep. 246.} directed *Episcopo*, but *Ballivis* of the Bishop Elect. The Order of making a Bishop consists chiefly in these Eight things, viz. 1. *Nomination*, 2. *Congè d'Eslire*, 3. *Election*, 4. *Royal Assent*, 5. *Confirmation*, 6. *Creation*, 7. *Consecration*, 8. *Installation*. ^{Vid. Gren-} don's Case in *Plowd.* & *Trin.* 17 *Jac. B. R. Sobrean & Teige* vers. *Ke-* ^{van. Roll. Rep. par. 2.*} The Creation of a Bishop is in this solemn ^{= F. N. B. 1.} manner, viz. The Bishop's See being vacant, the Dean and Chapter of that Cathedral gives notice thereof to the King, humbly requesting his Majesty's leave to chuse another; the King grants his *Congè d'Eslire*: Thereupon the Dean summons a Chapter; they elect the person recommended by his Majesty's Letters; that Election (after a first or second modest refusal) being accepted by the party elected, is certified to the King, and to the Archbishop of that Province; hereupon the King grants his Royal Assent under his Great Seal, exhibited to the said Archbishop, with command to confirm.

Confirm and Consecrate him; upon this the Archbishop subscribes his *Fiat Confirmatio*, withall giving Commission under his Archiepiscopal Seal to his Vicar-General, to perform all the acts requisite for perfecting his Confirmation. Hereupon the Vicar-General in the Archbishop's name issues a Citation, summoning all Opposers of the said Election to make their appearance at a certain time and place, then and there to offer their Objections, if they have any: This done by an Officer of the High Court of *Arches* (usually at *Bow-Church, London*) by Proclamation thrice, and affixing the said Citation on that Church-door, an authentick Certificate thereof is by the said Officer returned to the said Archbishop and Vicar-General. At the time and place aforesaid the Proctor for the said Dean and Chapter exhibits the Royal assent, and the Commission of the Archbishop, to the Vicar-General, who after the reading thereof accepts the same; Then the Proctor exhibits the Proxy from the Dean and Chapter, presents the elected Bishop, returns the Citation, and desires that the Opposers may be thrice publicly called; which done, and their Contumacy acculed, desires that *in pernam Contumacia* the business in hand may proceed, which the Vicar-General in a Schedule by him read and subscribed doth order. Then the Proctor gives a summary Petition, therein deducing the whole Process of Election and Consent, and desires a time may be assign'd him to prove it, which the Vicar-General admits and decrees. After this, the Proctor exhibits the Royal assent again, with the elected Bishop's assent, and the said Certificate to the Archbishop, desiring a time to be presently assigned for final Sentence, which the Vicar-General Decrees. Then the Proctor desires, that all opposers may again be thrice publicly called; which done, and none appearing nor opposing, they are pronounced contumacious, and a Decree made to proceed to Sentence, by a Schedule read and subscribed by the Vicar-General. Whereupon the Bishop elect takes the Oath of Supremacy, Simony, and Canonical Obedience. After this, the Dean of the *Arches* reads and subscribes the Sentence. Next after the Confirmation, follows the Consecration of the elected Bishop, according to the King's Mandate, which is solemnly done by the Archbishop, with the assistance of two other Bishops, according to the approved Rights and Ceremonies of the Church of *England*, and in conformity to the manner and form of Consecrating Bishops, according to the Rule laid down in the Fourth Council of *Carthage*, about the year 470. generally received in all the Provinces of the Western Church. After the Premises, there issues a Mandate from the Archbishop to the Archdeacon of his Province, to install the Bishop Elected, Confirmed and Consecrated; who (or his Proxy, which is usual) being in presence

sence of a Publick Notary introduced into the Cathedral Church on any day, between the hours of 9 and 11, by the said Archdeacon, doth first declare his assent to the King's Supremacy, &c. Then the Archdeacon, with the Canons, &c. having accompanied the Bishop to the Chaire, and placed him in the Episcopal Seat, doth pronounce as followeth, viz. *Ego auctoritate mihi commissa induco & inthronizo Reverendum in Christo Patrem, Dom. J. S. Episcopum; Et Dominus custodiat sanum introitum & exitum ex hoc nunc & in seculum, &c.* Then after the Divine Service proper for the occasion, the Bishop being conducted into the Chapter-house, and there placed on a high Seat, the Archdeacon and all the Prebends, &c. of the Church acknowledge Canonical Obedience to him. And the publick Notary, by the Archdeacon's command, records the whole matter of Fact in this Affair, in an instrument to remain as Authentick to Posterity. After all which, the Bishop is introduced into the King's presence to doe his Homage for his Temporalities or Barony, by kneeling down, and putting his hands between the hands of the King, sitting in his Chair of State, and by taking a solemn Oath, to be true and faithfull to his Majesty, and that he holds his Temporalities of Him. When *Matth. Parker*, in the second year of Queen *Eliz.* 1559. elected to the Archbishoprick of *Canterbury*, had his Confirmation in the Court of *Arches*, according to the usual form in that behalf; this being performed, an entertainment for the Vicar-General, the Dean of the *Arches*, and other Officers of that Court (whose presence was requisite at this solemnity) was provided at the *Nagshead Tavern* in *Cheapside*, *London*, whereby occasion was taken by the *Roman* Adversaries maliciously to report, That the *Nagshead Tavern* was the place of Consecration: *Heyl*. The form and manner of making a Bishop, and of translating him from one Bishoprick to another, differs onely in this, that in the latter there needs no Consecration. And the Translation of a Bishop to an Archbishoprick, differs onely in the Commission, which is directed by his Majesty to four or more Bishops to confirm him.

(5. Each Archbishop, every Bishop, and their Officials have their Seals of Office respectively, which being affixed to a writing, makes the Instrument authentick, whereby the use and practice of *Tabellions*, or Publick Notaries (as in Foreign parts) is with us much abated. For that of a *Tabellion* allowed by Authority to Engross and Register private Contracts and Obligations, his Office in some Countreys did formerly differ from that of a publick Notary, but now they are as one and the same Office; *Quoniam Tabellionum usus in Regno Angliæ, propter quod magis ad Sigilla Authentica credi est necesse, ut eorum facilius habeatur. Statuimus ut Sigillum habeant non solum Archiepiscopi & Episcopi, sed eorum Officiales* y. *An.* 1236.

y *Mat. Paris.*
fo. 454. de
An. 1236.

And all Bishops, Ordinaries, Archdeacons, and all others exercising any Ecclesiastical Jurisdiction, ought to have the King's Arms engraven on their Seal of Office; but the Archbishop of Canterbury may use his own Seal. And all Process Ecclesiastical, and Certificates into any Court of Record, are to be in the King's name, Teste the Bishop. But as to the making, admitting, ordering, and reforming of Chancellours, Commissioners, Officials, Advocates, Proctors, and other Officers, Ministers and Substitutes, this the Bishops may doe in their own Names, and under their own Seals. (6.) If one be elected, and the Temporalities granted to him, yet he is not Bishop before Consecration, 41 E. 3. 6. 46 E. 3. 32. *Quere*, For he may refuse to be Bishop after Election, and before Consecration, but not after, 41 E. 3. 3. b. When upon vacancy of a Bishoprick the Dean and Chapter, by virtue of his Majesty's License, under the great Seal of England, have proceeded to the Election of a new Bishop in pursuance of, and according to his Majesty's Letters Missive on that behalf, and Certificate thereof made unto the King's Majesty under their common Seal; then follows the confirmation, Consecration and Investiture, by the Archbishop or Metropolitan of that Province, wherein such Bishoprick was void; the said Election having (upon such elected Bishop's Oath of Fealty to the King's Majesty) been first signified to the Archbishop by the King, under his Great Seal, whereby the said Archbishop is required to confirm the said Election, and to consecrate and invest the Person elected; And now he is complete Bishop, as well unto Temporalities as Spiritualities; yet after his Confirmation, and before his Consecration, the King may (if he please) *ex gratia* grant him the Temporalities. 41 Ed. 3. 6. 46 Ed. 3. 22. But after his Consecration, Investiture and Instalment, he is qualified to sue for his Temporalities out of the King's Hands by the Writ *de Restitutione Temporalium*. And yet it seems the Temporalities are not *de jure* to be delivered to him, until the Metropolitan hath certified the time of his Consecration, although the Freehold thereof be in him by his very Consecration. But if during the Vacation of Archbishopricks, or Bishopricks, and while their Temporalities are in the King's hands, the Freehold-Tenants of Archbishopricks or Bishops happen to be attainted of Felony, the King by his Prerogative hath the Escheats of such Freeholders Lands, to dispose thereof at his pleasure, saving to such Prelates the Service that is thereto due and accustomed. Before the Conquest the Principality of Wales was held of the King of England, and by the Rebellion and forfeiture of the Prince, the Principality came to the King of England, whereby the Bishopricks were annexed to the Crown, and the King grants them their Temporalities. 10 H. 4. 6.

* Stat. 1 Ed.

6. 2.

* *Ibid.*

* *Ibid.*

Bishops have
Precedency of
all Temporal
Barons under
Vicounts.

* 41 Ed. 3. 6.
46 Ed. 3. 22.

* F. N. B.
acc.

* 38 E. 3. 30.
Parf. Law,
cap. 1.

* St. 17 Ed.
2. 14.

(7.) The manner of making a Bishop is fully described in *Evans* and *Kiffin's Case* against *Akreth*, wherein it was agreed, That when a Bishop dies, or is translated, the Dean and Chapter certify the King thereof in *Chancery*, and pray leave of the King to make Election; Then the King gives his *Gorge and Effie*, whereupon they make their Election, and first certify the same to the party Elect, and have his Consent; then they certify to the King in *Chancery*; also they certify it to the Archbishop; and then the King by his Letters Patents gives his Royal Assent, and commands the Archbishop to confirm and consecrate him, and to doe all other things necessary thereunto; whereupon the Archbishop examines the Election, and the Ability of the party, and thereupon confirms the Election; and after consecrates him according to the usage upon a new Creation; And upon a Translation all the said Ceremonies are observed, saving the Consecration, which is not in that case requisite, for that he was consecrated before.

(8.) Bishopricks were Donatives by the King, till the time of *W. Rufus*, and so untill the time of King *John*. Reads for that the History of *Endmerus*, *Kid. Case* *Evans* vers. *Alcouth*, in *fin. Cef. Nov. Rep.* It hath been generally held, That before the Conquest, and after, till the time of King *John*, Bishops were invested by the King *per Baculum & Annulum*; but King *John* by his Charter granted, That there should be a Canonical Election with three Restrictions: (1.) That leave be first asked of the King. (2.) His Assent afterwards. (3.) That he shall have the Temporalties during the vacation of the Bishoprick; whereof mention is made in the *Stat. of 25 Ed. 3. de Provisionibus*; and which is confirmed by the *Stat. of 13 R. 2. c. 2. f.* Also the Law in general is positive therein, That in the making of all Bishops, it shall be by Election and the Kings Assent; and by the 25 H. 8. the Statute for Consecration of Bishops makes it more certain: And if the Pope after the said Charter did use to make any Translation upon a Postulation without Election and Assent of the King, it was but an usurpation, and contrary to the Law; and restrained by 16 R. 2. and 9 H. 4. 8. And after the 25 H. 8. it was never used to have a Bishop by Postulation or any Translation of him, but by Election; as the said Statute prescribes; and the form of making a Bishop at this day, is after the same manner as aforesaid, and according to The said Statute.

(9.) The Interest and Authority which a Bishop Elect hath, is, That he is *Episcopus Nominis, non Ordinis, neque Jurisdictionis*; But by his Confirmation he hath *Potestatem Jurisdictionis*, as to Excommunicate and Certifie the same. 8. Rep. 89. And then the power of the Guardian of the Spiritualties doth cease. But

Case of the
Dean and
Chapter of
Norwich.
Co. Rep.
par. 3.

Dyer 350.

after Election and Confirmation, he hath *Potestatem Ordinationis*, for then he may consecrate, confer Orders, &c. For a Bishop hath Three Powers, (1.) *Ordinis*, which he hath by Consecration, whereby he may take the Resignation of a Church, confer Orders, consecrate Churches; and this doth not appertain to him *quatenus* Bishop of this or that place, but is universal over the whole world: So the Archbishop of *Spalato*, when he was here, conferred Orders. (2.) *Jurisdictionis*, which is not Universal, but limited to a place, and confin'd to his See; This power he hath upon his Confirmation. (3.) *Administratio rei familiaris*, as the Government of his Revenue; and this also he hath upon his Confirmation. The Bishop acts either by his *Episcopal Order*, or by his *Episcopal Jurisdiction*; By the former he ordains Deacons and Priests, Dedicates or Consecrates Churches, Chapels and Church-yards, administers Confirmation, &c. By the latter he acts as an Ecclesiastical Judge in matters Spiritual, by his Power either *Ordinary* or *Delegated*.

* Evans and
Ascough's,
Case. Latch.
Rep.

(10.) *An. 1430. Temp. Reg. H. 6. Hen. Chicheley Archiepisc. Cant. in Synodo constitutum est, Ne quis Jurisdictionem Ecclesiasticam exerceret, nisi Jure Civili aut Canonico gradum aliquem ab Oxoniensi vel Cantuariensi Academiis accepisset. Ant. Brit. fo. 284. m. 40.* The power of the Bishop and Archbishop is derived from the Crown, as was held in *Walker's Case* against *Lamb*; where it was also held, That the Grant of a Commissary or Official to one was good, notwithstanding he were a Lay-man, and not a Doctor of Law, but only a Bachelor of Law; for the Court then said, That the Jurisdiction of the Bishop and Archdeacon is derived from the Crown by usage and prescription; and that in it self, as it is coercive to punish Crimes, or to determine Matrimonial Causes and Probate of Testaments; and granting of Administrations, being Civil Causes are derived from the Crown, and not incident *de mero Jure* to the Bishop, which appears by *Henslow's Case*, par. 9. *Cawdry's Case*, par. 5. 1 Ed. 6. c. 2. the Stat. of 37 H. 8. and divers other Authorities, and the Stat. of 37 H. 8. c. 17. is to that purpose.

* Trin. 8.
Car. B. R.
Case Walker
vers. Lamb,
Jones Rep.

* Ant. Brit.
fo. 22.

(11.) In former times many Bishops had their *Suffragans*, who were also consecrated, as other Bishops were; These (in the absence of the Bishops upon Embassies, or in multiplicity of business) did supply their places in matter of Orders, but not in *Jurisdiction*. These were chiefly for the ease of the Bishops in the multiplicity of their Affairs, ordain'd in the Primitive times, called *Chorepiscopi*, *Suffragan*, or *Subsidiary Bishops*, or *Bishops Suffragans*, and were Titular Bishops, consecrated by the Archbishop of the Province: and to execute such Power and Authority, and receive such profits as were limited in their Commissions by the Bishops or Diocesans, whose Suffragans they were. What Towns or Places

to

to be the Sees of Bishops Suffragans, and how many to a Diocese, and in what Dioceses, appears by an Act of Parliament made in the Reign of King H. 8. Such Suffragan Bishops are made in case the Archbishop, or some other Bishop desire the same; In which case, the Bishop presents two able persons for any place allowed by the said Act of Parliament, whereof his Majesty doth chuse one; but at present there are no suffragan Bishops in England. They were no other than the *Chorepiscopi* of the Primitive times, Subsidiary Bishops, ordained for easing the Diocesan of some part of his Burthen, as aforesaid: by means whereof they were enabled to perform such Offices belonging to that sacred Function, not limited to time and place by the ancient Canons, by which a Bishop was restrained in some certain Acts of Jurisdiction to his proper Diocese. Of these there were twenty six in the Realm of England, distinguished by the Names of such principal Towns as were appointed for their Title and Denomination. The Names and Number whereof, together with the Jurisdiction and preeminences proportioned to them, the Reader may peruse in the Act of Parliament made An. 26. H. 8.

(12.) According to the Temporal Laws of this Land, if a Bishop grant Letters of Institution under any other Seal than his Seal of Office, and albeit it be out of his Diocese, yet it is good; For in *Cort's Case* against the Bishop of St. Davids and others, where the Plaintiff offered in evidence Letters of Institution, which appeared to be sealed with the Seal of the Bishop of London, because the Bishop of St. Davids had not his Seal of Office there, and which Letters were made also out of the Diocese; It was held, That they were good enough, albeit they were sealed with another Seal, and made out of the Diocese; for that the Seal is not material, it being an Act made of the Institution: And the writing and sealing is but a testimonial thereof, which may be under any Seal, or in any place. But of that point they would advise^m.

(13.) A Bishop, if he celebrate Divine Service in any Church of his Diocese, may require the Offerings of that dayⁿ. He may sequester, if the King present not; and 12 H. 8. 8. by *Pollard*, he must see the Cure served, if the person fail, at his own Costs^o. He may commit Administration, where Executors being called, refuse to prove the Will^p. He hath power of distribution and disposing of Seats, and charges of Repairs of the Churches within his Diocese^q. He may award his *Jure Patronatus* where a Church is *Litigious* between an Usurper and the other; but if he will chuse the Clerk of either at his peril, he ought at his peril to receive him that hath Right by the Statute^r. He may *Licence* Physicians, Chirurgeons, Schoolmasters and Midwives^s. He may Collate by *Lapfe*. He may take competent time to examine the sufficiency, and

Heyl. Hist.
Eccl. p. 294.

^m Hill. 8. Car.
ⁿ B. R. ro. 454.
^o Cort vers. Bp.
^p St. Davids,
^q & alios, Cro.
^r Rep.
^s Linw. de
^t jure Presbyt.
^u verb. Oblatio-
^v nis.
^w Colt & Glo-
^x ver. vers. Bp.
^y of Coventry
^z & Lichfield.
^{aa} Hob. Rep.
^{ab} p 4 H. 7. 13.
^{ac} 10 H. 7. 18.
^{ad} 7 E. 4. 12.
^{ae} Lett. ad Col-
^{af} leg.
^{ag} Case Booth-
^{ah} ly vers. Bail.
^{ai} Hob. Rep.
^{aj} Lord Stan-
^{ak} hop's Case
^{al} vers. Bp. of
^{am} Lincoln & al.
^{an} W. 2. cap. 5.

and fitness of a Clerk. He may give convenient time to persons interested to take notice of Avoidances. He is discharged against the true Patron, and quit of Disturbance, to whom it cannot be imputed, if he receive that Clerk, that is in pursuance of a Verdict after Inquest in a *Jure Patronatus*. He may have six Chaplains, and every Archbishop may have Eight Chaplains. He may unite and consolidate small Parishes; and assist the Civil Magistrate in execution of some Statutes concerning Ecclesiastical Affairs. And by the Statute of 1 *Eliz. cap. 2.* any Bishop may at his pleasure joyn and associate himself to the Justices of Oyer and Terminer, or to the Justices of Assize at the open and general Sessions to be holden at any place within his Diocese, in Causes of the Church. And the Statute made 17 *Car. 1. c. 27.* for the disenabling of persons in Holy Orders to exercise Temporal Jurisdiction or Authority, is repealed by the Statute of 13 *Car. 2. c. 2.* whereby they are now enabled to exercise such Temporal Jurisdiction as formerly; and is commonly stiled the Ordinary of that Diocese, where he doth exercise his Episcopal Authority and Jurisdiction. In Parliament, Bishops, as Barons, may be present and vote at the Trial and Arraignment of a Peer; onely before Sentence of Death, or loss of Member, be pronounced, (that they may have no hand in blood in any kind) they have by Canon Law the Privilege and Injunction to absent themselves; and by Common Law, to make Proxies to vote for them.

(14.) *ORDINART*, according to the acceptation of the Common Law with us, is usually taken for him that hath Ordinary Jurisdiction in Causes Ecclesiastical, immediate to the King. He is in common understanding the Bishop of the Diocese, who is the Supervisor, and for the most part Visitor of all his Churches within his Diocese, and hath Ordinary Jurisdiction in all the Causes aforesaid for the doing of Justice within his Diocese *in jure proprio & non per deputationem*, and therefore it is his care to see that the Church be provided of an able Curate, *Habet enim Curam Curatum*, and may execute the Laws of the Church by Ecclesiastical Censures, and to him alone are made all Presentations to Churches vacant within his Diocese. *Ordinarius habet locum principaliter in Episcopo, & aliis Superioribus, qui soli sunt Universales in suis Jurisdictionibus: sed sunt sub eo alii Ordinarii, hi videlicet, quibus Competit Jurisdictio Ordinaria de Jure, privilegio, vel consuetudine.* *Linw. cap. Exterior. tit. de Constitutionib.*

(15.) The Jurisdiction of the Ordinary or Bishop, as to the Examination of the Clerk, or as to the Admission or Institution of him into a Benefice, is not Local; but it follows the person of the Ordinary or Bishop wheresoever he is: And therefore if a Clerk

¹ Sir W. Elwin
vers. Archbi-
shop of York
and others.

² Hob. Rep.

³ Stat. 21 H.
8. c. 13.

⁴ Vid. Broo.
theob. lib.

be presented to the Bishop of *Norwich*, to a Church which is void within the Diocese of *Norwich*, who is then in *London*; or if it be to a Bishop of *Ireland*, who is then in *England*, and in *London*; the Ordinary may examine the Clerk, or give him Admission or Institution in *London*: And so it was adjudged.

(16.) The Ordinary is not obliged upon a Vacancy to receive the Clerk of him that comes first; for as he may take competent time to examine the sufficiency and fitness of a Clerk, so may he give convenient time to persons interested, to take knowledge of the Avoidance, even in case of Death; and where notice is to be taken, not given, to present their Clerks to it. And perhaps, if he do receive the Clerk of him that comes first, yet he may quit himself of a Disturbance, because he doth nothing therein but as Ordinary in Law. But if two or more Present, so that the Title is become litigious, then and in such case he cannot receive the Clerk of any, of his own pleasure, except the Title be certain, but hath his way of safety by *Jure Patronatus*; and when he hath used the *Jure Patronatus*, and that finds for one party, yet he may still receive a contrary Clerk if he will, for who can let him? but that must be at his own peril, and that is at a double peril, (1.) That the Title be the better, (2.) That the Patron, whose Clerk he hath received, will plead and defend that Title; for otherwise he cannot do it. But though after Inquest, in *Jure Patronatus*, the Ordinary may accept the contrary Clerk, yet it is against Justice and the intent of the Law; For since it is a Provision merely for the good and safety of the Ordinary, and he pretends doubt; and therefore puts the Patron to this enquiry to his charge and delay to satisfy and secure him, he ought to judge and receive the Clerk according to that Verdict. And that is the true meaning of the Books that say, that the Ordinary is to judge of the better Title, that is, not to prejudice of his own Will, but *secundum allegata & probata*, upon Verdict of the Right given and found according to the form of Law, to give Institution which is his Judgment, and the Induction his Execution. And though it is but an Inquest of Office, and therefore binds not; True it is, it binds not, but with a distinction, that is, it binds not the Patron in his *Quare impedit*, but is Final, even to the true Patron, that he cannot impute disturbance to the Ordinary, following that Verdict, and therefore it ought to bind him to follow it. For to these purposes it is a full Verdict, never to be tried again. And if but one present, if the Ordinary make doubt of his Title, as in many cases he justly may, being a stranger to it, he may require satisfaction by *Jure Patronatus*.

(17.) If it be demanded, whether the ordinary can cite a man out of his Diocese? the Common Law answers it in the negative; And so it was held by *Jones* and *Whitlock*, Justices in *Brown's Case*, where

* 27 Eliz.

C. B. in *Carter & Croft's Case*.

Leam. 33. &

Pasch. 21 Jac.

C. B. in *Kneely's* and *Dob-*

bins Case 342.

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where they held, That at the Common Law a Bishop cannot cite a man out of his Diocese; and there *Whitlock* held, that the Ordinary hath not any power of Jurisdiction out of his Diocese, but to absolve a person excommunicated^e. If one in *N.* commit Adultery in another Diocese; during the time of his Residence, he may be cited in the Diocese where he committed the offence, although he dwell out of the Diocese: by *Coke*, *Warburton* and *Winch*^{*}. And in the time of his Visitation he hath *Jus ad Synodalia*, according to the Custome more or less, as in *Gloucestershire*, where the Impropriation of *Derehurst* pays annually 7s. 9d. *pro Synodalibus & Procuracionibus*; for this Synodal is not in this sense here taken as in the Statute of 25 H. 8. cap. 19. for *Synodals Provincial*, which seem to signify the Canons or Constitutions of a Provincial Synod nor for the Synod it self, which the word *Synodal* doth sometimes signify; but it is here in the same sense as the word *Synodal* in the Statute of 34 H. 8. cap. 16. for a *Synodal* is no other than a Cense or Tribute in money, paid to the Bishop or Archdeacon by the Inferiour Clergy.

(18.) Every Spiritual person is visitable by the Ordinary^f. So is a Dean *de mero jure*, for he is Spiritual^g. The Ordinary hath also power of Correction of a Parson^h. And every Hospital, be it Lay or Spiritual, is visitableⁱ. By the ancient Law of the Realm the King hath power to visit, reform and correct all Abuses and Enormities in the Church^k. Nor are the King's Donatives visitable by the Ordinary^l; but properly by the Lord Chancellor^m. And the King may grant a Special Commission to that purposeⁿ. But as to Hospitals if they be Spiritual, the Ordinary shall visit them; if they be Lay-Hospitals, the Patron^o. In the Stat. of 1 El. cap. 2. there is a *Proviso*, That all and singular Archbishops and Bishops, and every of their Chancellours, Commissaries, Archdeacons and other Ordinaries, having any peculiar Ecclesiastical Jurisdiction, shall have full power and authority by virtue of this Act, as well to enquire in their Visitations, Synods, and elsewhere within their Jurisdiction, or any other time or place, to take occasions and informations of all and every the things above mentioned, done, committed, or perpetrated within the Limits of their Jurisdiction or Authority, and to punish the same by Admonition, Excommunication, Sequestration, or Deprivation, and other Censures and Process in like manner as heretofore hath been used by the Queen's Ecclesiastical Laws. The Ancient custome was for the Visitor to visit in his own person, & *visitare Ecclesiasticum, per cunctas Dioeceses parochiasque suas*, 10. q. 1. c. *Episcopum E. Concil. Toletan* 4. ca. 35. This Visitation is a special and peculiar duty belonging to every Bishop, as derived from the Apostles, who themselves were Visitors, and for that end and purpose did

^{*} *Brown's*
Cafe, Latch.
Rep.
^{*} *Brown's*
Cases and
Law.

^{*} *Davis* 1.
Commend.
72. b.
^{*} D. 10. El.
273.
^{*} 20 H. 6. 46.
^{*} Co. 10.
Sutton's Hosp.
31.
^{*} *Davis* 1.
Proxies. 4.
^{*} *Davis* 1.
D. & C. de
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^m *Davis* 1.
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ⁿ D. 1. 46.
^o Co. 10.
Sutton's 31.

Acts 15, &
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did *pertransire Ecclesias & Urbes*. The Bishop hath his *Triennials*, per *Archidiaconum Visitatio potest fieri singulis annis*. *Extr. de Offic. Archid. c. Mandamus*. We find also, that *Episcopus debet visitare singulis annis Parochiam, nisi dimittat propter gravamen Ecclesiarum, & tunc mittat Archidiaconum, &c. Ab. Sic. super 2. 1. de Offic. Archid. c. ut Archidiaconus 10. q. 1. c. Decrevimus, &c. Episcopam.*

2 Cok. 15.
D. Spelm.
Conc. p. 238.

(19.) Every Bishop hath his Cathedral and Council, and the Council and Bishop there decide matters of Controversie; the Prebends have their names from the affording of help to the Bishop. If any Clerk, after he hath sworn Canonical Obedience, should happen to commit *Episcopicide*, he is guilty of *Petty-Treason*, and shall suffer as such. Whereas heretofore the County of Gloucester was a part of the Diocese of Worcester, out of which it was taken by King H. 8. when first made a Bishoprick; the Diocese of Worcester was in the time of King Ed. 6. laid to the See of Gloucester. Dr. Heylin's *Hist. Eccl.* p. 101. Next unto the two Archbishops, the Bishop of London, of all the other Bishops, hath the preeminence. *Episcopus Londinensis* (says an ancient Record) *speciali quadam Dignitate ceteris anteposendus, quia Ecclesia Cantuariensis Decanus est Provincialis*. The Bishop of *Duresme* (who is next in precedency) hath been a Count Palatine about six or seven hundred years, and hath at this day the Earldom of *Sadberg*, long since annexed to this Bishoprick by the King. Note, a President hath been shewed at Common Law, That the Bishop of *Durham* imprisoned one for a Lay-Cause; and the Archbishop of *York*, as his Sovereign, cited him to appear before him, to answer for that Imprisonment; and the Archbishop was fined four thousand Marks. *Cro. par. 1.* The Bishop of *Winchester* was anciently reputed Earl of *Southampton*: All the other Bishops take place according to the Seniority of their Consecration, unless any Bishop happen to be made Lord *Chancellor, Treasurer, Privy-Seal, or Secretary of State*, which anciently was very usual. All the Bishops of England are *Barons and Peers* of the Realm, have place in the Upper House of Parliament, as also in the Upper House of Convocation; The Bishopricks were erected into Baronies by *William the Conquerour* at his coming into England. And as a special remark of Honour, Three Kings, *viz. of England, Scotland, and South-Wales*, in the year 1200. did contribute their *Royal Shoulders* for the conveyance of the deceased Corpse of *Hugh*, Bishop of *Lincoln*, to his Grave. And no wonder, when Princes themselves, and such as were of the *Blood Royal* were anciently Bishops in this Kingdom; they have been not onely of the best Nobility, but divers of the Sons and Brothers of several English Kings since the Conquest and before, have entred into *Holy Orders*, and became Ecclesiasticks, as at this day is practicable in the most of all

Brownl. Rep.
par. 1. Mich.
10 Jac. Cases
in Law, &c.

other Monarchies throughout the whole Christian World. *Esther-wolph*, Son and Successour to *Egbert*, first sole King of England, was in *Holy Orders*, and Bishop of *Winchester* at his Father's death. *Odo*, Brother to *William the Conquerour*, was Bishop of *Bayeux* in *Normandy*. *Henry de Blois*, Brother to King *Stephen*, was Bishop of *Winchester*. *Geofrey Plantaginet*, Son to King *Henry the Second*, was Bishop of *Lincoln*. And *Henry de Beauford*, Brother to King *Henry the Fourth*, was Bishop also of *Winchester*.

(20.) The Statute of 17 *Car. 1. cap. 27.* for disabling persons in Holy Orders to exercise Temporal jurisdiction or authority, being repealed (as aforesaid) by the Statute of 13 *Car. 2. cap. 2.* they are thereby restored to the exercise of Temporal jurisdiction, as formerly, which indeed is no more than what they ever anciently exercised in this Kingdom; For, *Ex Clero Rex semper sibi eligebat Primos à Consiliis, Primos ad Officia Regni obeunda. Primi igitur sedebant in omnibus Regni Comitibus & Tribunalibus Episcopi, in Regali quidam Palatio cum Regni Magnatibus, in Comitatu una cum Comite, in Turno cum Vice comite, & in Hundredo cum Domino Hundredi, sic ut in promovenda Justitia usquequaque gladii gladium adjuvarent, & nihil inconsulto Sacerdote vel Episcopo ageretur.* This Union of Persons, authority, and Courts of Judicature, Ecclesiastical and Civil, (as *Selden lib. 2. de Synedr. 2.* Mr. *Selden* proves) continued above Four thousand years, till Pope *Nicholas* the First, about the Eighth Century, to exclude the Emperour from meddling in the Ecclesiastical Government, began to exclude the Clergy from meddling with the Civil. And for the space of four or five hundred years, during the Reign of the Saxon Kings in England, the Ecclesiastical and Secular Magistrates sat jointly together, determining Ecclesiastical affairs in the Morning, and Secular or Civil affairs in the Afternoon; so that in those days, as there was no clashing of Jurisdictions, so no complaint touching *Prohibitions*; but an unanimous harmony in a kind of joint-jurisdiction in reference to all Ecclesiastical and Civil affairs; until *William the Conquerour* did put a distinction between Church and State, in a more divided way than formerly had been practised. Also the excellent Laws made by King *Ina*, King *Arhelstan*, King *Edmund*, and *St. Edward the Confessor*, from whom we have our Common Laws, and our Privileges mentioned in *Magna Charta*, were all made by the persuasions and advice of Archbishops and Bishops, named in our Histories.

(21.) That which during the Reign of King *Edw. 6.* made the greatest alteration, and threatned most danger to the State Ecclesiastical, was the Act entituled, *An Act for Election, and what Seals and Styles shall be used by Spiritual persons, &c.* In which it was ordained, That Bishops should be made by the King's Letters Patents, and

Vid. Grat. Dist. c. Cum ad verum.

and not by the Election of the Deans and Chapters: That all their Processes and Writings should be made in the King's Name only, with the Bishop's Teste added to it; and sealed with no other Seal than the Kings, or such as should be authorized and appointed by him. In the compounding of which Act there was more danger (as Dr. Heylin observes) couched, than at first appeared. For by the last Branch thereof it was plain and evident (says he) that the intent of the Contrivers was, by degrees to weaken the Authority of the Episcopal Order, by forcing them from their strong hold of Divine Institution, and making them no other than the King's Ministers onely, or as it were, his Ecclesiastical Sheriffs, to execute his Will, and disperse his Mandates. And of this Act such use was made (though possibly beyond the true intention of it) that (as the said Dr. Heylin observes) the Bishops of those times were not in a Capacity of conferring Orders, but as they were thereunto impowred by special License. The Tenour whereof (if Sanders be to be believed) was in these words following, viz. *The King to such a Bishop Greeting, Whereas all and all manner of Jurisdiction, as well Ecclesiastical as Civil, flows from the King as from the Supreme Head of all the Body, &c. We therefore give and grant to thee full power and lincense, to continue during our good pleasure, for holding Ordination within thy Diocese of N. and for promoting fit persons unto Holy Orders, even to that of the Priesthood.* Which being looked on by Queen Mary, not onely as a dangerous diminution of the Episcopal Power, but as an odious Innovation in the Church of Christ; she caused this Act to be repealed in the first year of her Reign, leaving the Bishops to depend on their former claim, and to act all things which belonged to their Jurisdiction in their own Names, and under their own Seals, as in former times. In which estate they have continued without any Legal Interruption, from that time to this. But (says the same Authour) in the first Branch there was somewhat more than what appeared at the first sight: For, though it seemed to aim at nothing, but that the Bishops should depend wholly on the King for their preferment to those great and eminent places; yet the true drift of the Design was, to make Deans and Chapters useless for the time to come, and thereby to prepare them for a Dissolution. For, had nothing else been intended in it, but that the King should have the sole Nomination of all the Bishops in his Kingdoms, it had been onely a reviver of an ancient power, which had been formerly invested in his Predecessours, and in all other Christian Princes. If we consult the Records of elder times, it will readily appear, not onely that the Roman Emperours of the House of France did nominate the Popes themselves; but that, after they had lost that power, they retained the Nomination of the Bishops in their own Dominions. The like done also by the German Emperours, by

Dr. Heylin, Hist. Eccl. de Temp. Ed. 6. p. 51, 52. the Kings of *England*, and by the ancient Kings of *Spain*: The Investiture being then performed *per Annulum & Baculum*, that is by delivering of a *Ring*, together with a *Crosier* or *Pastoral Staff*, to the party nominated.

(22.) By ancient Right the Bishops of *London* are accounted *Deans* of the Episcopal College; and being such, are by their place to signify the pleasure of their *Metropolitan* to all the Bishops of the Province, to execute his *Mandates*, and disperse his *Missives*, on all emergency of Affairs: As also to preside in Convocations, or Provincial Synods, during the vacancy of the See, or in the necessary absence of the Metropolitan.

ib. p. 54, 55. Mich. 17 Jac. Br. Revan O Brian and others, and Knivan's case. Cro. par. 2. (23.) In *O Brian* and *Knivan's Case*, the Case was, That King *Ed. 6.* under his Privy Seal signified to Sir *J. C.* and to the Lord *Chancellor*, and others in *Ireland*; That he elected and appointed *J. B.* to be Bishop of *Ossory*: requiring them to Install him in the Bishoprick. The Deputy being removed, the Chancellor and the other made a Commission under the Great Seal of *Ireland* to the Bishop of *Dublin* to consecrate him; which was done accordingly, and he did his Fealty, and recovered the Temporalities out of the King's hands. Afterwards in the life of *J. B.* Queen *Mary* elected *J. T.* to be Bishop there: who was likewise consecrated, and who made a Lease of divers Lands of the Bishoprick for 101 years, which was confirmed by the Dean and Chapter. *J. B.* died; and after *J. T.* died *J. W.* was elected Bishop. The Questions in the Case were, (1.) Whether *J. B.* was well created Bishop? (2.) Whether this Lease made by *J. T.* being Bishop *de facto*, but not *de jure* in the life of *J. B.* he surviving *J. B.* should be good to bind the Successour? Resolved, The Commission was well executed, although the Deputy Sir *J. C.* were removed. (2.) Resolved, That before the Statute of 2 *Eliz.* the King might by Patent without a Writ of *Congè d'Eslire* create a Bishop, for that was but a Form or Ceremony. (3.) Resolved, That although *J. T.* was Bishop *de facto* in the life of *J. B.* that the Lease made by him for 101 years was void, though it was confirmed by the Dean and Chapter, and should not bind the Successour: But all Judicial Acts made by him, as *Admissions*, *Institutions*, &c. should be good; but not such voluntary Acts as tended to the depauperation of the Successour.

Mich. 3 Car. C. B. Owen and Tho. Ap. Ree's Case. Cro. par. 3. A Bishop made a Lease for three Lives, not warranted by the Statute of 1 *Eliz.* rendring Rent; the Successour accepted the Rent. It was Resolved, It should bind him during his time, so as he shall not avoid the Lease, which otherwise was voidable.

CHAP. IV.

Of the Guardian of the Spiritualties.

1. *What the Office of such a Guardian is, and by whom constituted.*
2. *The power of such Guardians in vacancy of Archbishopricks.*
3. *What Remedy in case they refuse to grant such Licenses or Dispensations, as are legally grantable.*
4. *Who is Guardian of the Spiritualties, of common Right.*
5. *What things a Guardian of the Spiritualties may doe.*

(1.) **G**uardian of the Spiritualties (*Custos Spiritualium, vel Spiritualitatis*) is he to whom the Spiritual Jurisdiction of any Diocese (during the vacancy of the See) is committed^a: Dr. Cowell conceives, that the Guardian of the Spiritualties, may be either Guardian in Law, or *Jure Magistratus* (as the Archbishop is of any Diocese within his Province) or Guardian by Delegation, as he whom the Archbishop or Vicar-General doth for the time depute. Guardian of, &c. by the Canon Law pertains to the Appointment of the Dean and Chapter. c. *ad abolend. Extr. Nè sede vacante aliquid innovetur*: But with us in England, to the Archbishop of the Province by Prescription. Howbeit (according to Mr. Gwin in the Preface to his Readings) divers Deans and Chapters do challenge this by Ancient Charters from the Kings of this Realm, Cowell verb. *Custos*. This Ecclesiastical Office is specially in request, and indeed necessarily in the time of the Vacancy of the Episcopal See, or when the Bishop is *in remotis agendis* about the publick Affairs of the King or State; at which time Presentations must be made to the Guardian of the Spiritualties, which commonly is the Dean and Chapter: or unto the Vicar-General, who supplies the place and room of the Bishop^b. And therefore if a man recover, and have Judgment for him in a *Quare Impedit*, and afterwards the Bishop (who is the Ordinary) dieth; In this case the Writ to admit the Clerk to the Benefice must be directed to the Guardian of the Spiritualties, *Sede vacante*, to give him Admission: But if before his Admission another be created Bishop of that See, and consecrated Bishop; in that case the power of the Guardian of the Spiritualties doth cease, and the party may have a new Writ to the new Bishop to admit his Clerk^c. A Guardian of the Spiritualties may admit a Clerk, but he cannot confirm a Lease^{*}.

^a Vid. St. 25.^b H. 8. c. 21. &c.^c 13 El. c. 12.^b Co. 1. par.^c Instit. acc.^c 18 Eliz.

Dyer 350.

^{*} Case Evans

and Ascouge

Latch. Rep.

(2.) The

(2.) The Guardian of the Spiritualities takes place as well in the vacancy of Archbishopricks as Bishopricks, and hath power of granting Licenses, Dispensations, and the like, during such vacancies, by the Stat. of 25 H. 8. whereby it is provided and enacted, That if it happen the See of the Archbishop of Canterbury to be void, that then all such *Licenses, Dispensations, Faculties, Instruments, Rescripts*, and other Writings which may be granted by virtue of the said Act, shall (during such vacation of the said See) be had, done, and granted under the Name and Seal of the Guardian of the Spiritualities of the said Archbishoprick, according to the tenour and form of the said Act, and shall be of like force, value and effect, as if they had been granted under the Name and Seal of the Archbishop for the time being. Where it is also farther enacted,

(3.) That if the said Guardian of the Spiritualities shall refuse to grant such *Licenses, Dispensations, Faculties*, &c. to any person that ought upon a good, just and reasonable cause to have the same; then and in such case the Lord Chancellour of England, or the L. Keeper of the Great Seal, upon any complaint thereof made, may direct the King's Writ to the said Guardian of the Spiritualities, (during such Vacancy as aforesaid) refusing to grant such *Licenses*, &c. enjoining him by the said Writ, under a certain penalty therein limited at the discretion of the said Lord Chancellour or Lord Keeper, that he shall in due form grant such *License, Dispensation, Faculty*, &c. according to the request of the Procurers of the same, or signify into Chancery by a day certain, for what cause he refused to grant the same: where, if upon such Certificate it shall appear, that the cause of such refusal was reasonable, just and good; that then it shall be admitted and allowed; otherwise there may issue thence by virtue of the said Statute a Writ of Injunction, commanding the said Guardian of the Spiritualities, so refusing as aforesaid, to make sufficient grant of such *License, Dispensation*, &c. by a certain day; and if after the receipt of such Writ, the Guardian of the Spiritualities shall yet refuse to grant the same, and shew no just or reasonable cause for so doing; that then and in such case the said Guardian of the Spiritualities shall incur such penalty to his Majesty, as shall be limited and expressed in the said Writ of Injunction; And moreover in such case, a Commission under the Great Seal may issue to Two Spiritual Prelates or Persons to be nominated by his Majesty, authorizing them to grant such *Licenses, Faculties* and *Dispensations*, as were so refused to be granted by the Guardian of the Spiritualities, as aforesaid: And what in this case is here enjoyn'd to the Guardian of the Spiritualities during the vacancy of the Archbishoprick, is likewise expressly by the said Statute to the Archbishop himself in the time of Plenarty, or Non-vacancy of the See.

(4.) Of

(4.) Of the Metropolitan, the Dean and Chapter is of common right the Guardian of the Spiritualities: Of inferior Bishopricks in times of Vacation, the Dean and Chapter of the See is of common right the Guardian of the Spiritualities, and not the Metropolitan^d. Yet 5 E. 2. *Quare Impedit*, 165. Admit. that during the vacancy of the Bishoprick of *Durham*, the Archbishop of *Tork* is Guardian of the Spiritualities. And 23 E. 1. Rot. Claus. Memb. 4. the Prior of *Christ-Church* in *Canterbury* was Guardian of the Spiritualities in time of vacation of the Archbishoprick. Of which Archbishoprick the Dean and Chapter is Guardian of the Spiritualities in the time of vacancy. Also of the Archbishoprick of *Tork*, the Dean and Chapter is Guardian of the Spiritualities in the vacancy thereof, and not the Archbishop of *Canterbury*, for that it is a distinct Province, not subordinate to, &c. contra 31 H. 6. 10. Admit. for there a Parson of the Province of *Tork* had aid of the Metropolitan Guardian of the Spiritualities of the Archbishoprick of *Tork*, in the time of vacancy of that Archbishoprick^e.

In the Case of *Grange* against *Denny* it was said by *Coke*, That of common Right, by the Common Law, the Dean and Chapter, *Sede vacante*, of the Bishop, is Guardian of the Spiritualities, as appears by *Pasch.* 17 E. 3. fo. 23. but that now the Archbishops have used to have this by way of Composition. And in the same Case it was said by *Doderidge*, That every Archbishop hath a Diocese and a Province, and of his Diocese he is a Bishop, and of his Province he is Archbishop, and within his Province he is to be Visitor of all the Churches within his Province: and *Sede vacante* of any Bishop within his Province, he himself is Guardian of the Spiritualities of all the Bishopricks within his Province: but *Sede vacante* of his own Diocese, the Dean and Chapter of this is Guardian of the Spiritualities; and that no mention is made in the Books of the Common Law of any such Composition aforesaid, but that the Guardian of the Spiritualities is to be according to the difference before put, between a Province and a Diocese.

(5.) The Learned Serjeant *Roll* in his Abridgment doth acquaint us out of the ancient Books, That a Guardian of the Spiritualities may Admit and Institute a Clerk presented to him^f. That the King did present to the Guardian of the Spiritualities of the Archbishoprick of *Dublin* (*Sede vacante*) for a Church in *Ireland*^g. That the Guardian of the Spiritualities may try Bastardy^h. That Letters were directed to all the Bishops, and (in the Vacancy) to the Guardian of the Spiritualities, to make Prayers for the King in his Journey in *France*ⁱ. And that the Prior of *Christ-Church* in *Canterbury*, Guardian of the Spiritualities during the Vacancy of that Archbishoprick, had a Felon delivered to him

^d Contra 31 H. 6. 10. admit. Dub. 17 E. 3. 23. b. where it is said, per Stouf. that in the time of R. 1. and ever before, the Metropolitan was Guardian till the time of H. 3. &c. Rot. Ab. ver. Prerogative, lit. S. ^e Roll. Abr. ibid. Mich. 13 Jac. B. R. Rot. 165. *Grange* ver. *Denny*. Bullstr. Rep.

^f 17 E. 1. Rot. ^g 2 E. 1. Rot. Pat. Memb. 5. ^h 41 Aff. 29. adjudged. ⁱ 22 E. 1. Rot. Clauso. Memb. 12. Dorfo.

^a 23 E. 1.
Rot. Claufo
Memb. 4.
^b Brownl.
Rep. pa. 1.
Mich. 10. Jac.
Cases in
Law, &c.

him^k. But in the time of the Vacancy of the Bishop, the Archbishop is Guardian of the Spiritualties, and not the Dean and Chapter.^l

C H A P. V.

Of Congè d' Eglise, Election and Confirmation.

1. *What Congè d' Eglise signifies; the Original thereof.*
2. *To whom it is directed; and the manner of Proceedings thereupon, and of Election.*
3. *Confirmation of Bishops, the form or manner thereof.*
4. *Confirmation in a Temporal, not Spiritual sense, what?*
5. *The Confirmation of Bishops elect beyond Sea, far different from this in England.*
6. *The Law and Practice in France, touching the making of Bishops.*

(1.) **C**ongè d' Eglise, in French, [*Leave to chuse*] is the King's permission to a Dean and Chapter to chuse a Bishop in the time of Vacancy^a. And time was when this *Venia Eligendi* was also the permission Royal to an Abby or Priory of his own Foundation to chuse their Abbat or Prior^b. But we now understand it under no other signification than as his Majesties leave vouchsafed to a Dean and Chapter to elect a certain person to succeed as Bishop of that Diocese, whose Episcopal See is vacant. For the better interpretation of this *Congè d' Eglise*, the Modern Pens refer themselves to Mr. Guin in the Preface to his *Readings*, where he saith, That the King of England, as Sovereign Patron of all Archbishopricks, Bishopricks and other Ecclesiastical Benefices, had of ancient time free Appointment of all Ecclesiastical Dignities, whensoever they happened to be void: Investing them first *Per Bacculum & Annulum*, and afterwards by his Letters Patents: And that in Process of time he made the *Election* over to others, under certain Forms and Conditions, *viz.* That they should at every Vacation before they chuse, desire of the King *Congè d' Eglise*, that is, Leave or License to proceed to Election, and then after the Election to crave the Royal Assent, &c. He affirmeth also by good proof, out of the Books of the Common Law, that King John was the first that granted this; and that afterwards it was confirmed by *Westminster* 1. cap. 1. which Statute was made *An. 3. Ed. 1.* And again by the Statute [*Articuli Cleri*] cap. 2. which was Ordained, *An. 25 Ed. 3. Stat. 3.* it is generally agreed, That the

^a F. N. B.
169. Term.
Leg.

^b Ibid. B. &
170. B. C.
&c.

the Kings of this Realm were originally the Founders of all Archbishopsricks and Bishopsricks within this Kingdom, being at first Donative *per traditionem Baculi Pastoralis & Annuli*: But afterwards King John by his Charter, 15 Jan. in the seventh year of his Reign, *De communi consensu Baronum*, granted that they should ever after be eligible. And from that time came in the *Conge d'Eslire*. *Vid. Co. 5. par. 14. in Caudry's Case. vid. Stat. 1 Jac. cap. 3. vid. 17 Ed. 3. cap. 40.*

(2.) The *Conge d'Eslire* being granted to the Dean and Chapter, they proceed accordingly to Election, which in the sense here intended, as appropriated to this Subject, is that Regular Choice, which is made of an Ecclesiastical person to succeed in the Office and dignity of Bishop, in, and of that Diocese, whose See at the time of such Election is vacant. This Election referring to an Episcopacy, or the choice of a new Bishop in a vacant See, is done by a Dean and Chapter; but there are also other Elections Ecclesiastical relating to a Regular choice of other persons to other Offices and Dignities in the Church, subordinate to the former; but here it is specially meant of such an election or choice of a new Bishop, as is precedent to Confirmation, Consecration and Investiture or Instalment, being made (as aforesaid) by the Dean and Chapter of a Cathedral Church, by virtue of the King's License and Letters Missive, according to his Majesty's Nomination and pleasure, contained in such Letters Missive, in pursuance of such License to elect, under the Great Seal of England; which Election being made accordingly, the Dean and Chapter are to return a Certificate thereof under their Common Seal unto his Majesty. This Election alone and of it self, be it to an Archbishoprick or Bishoprick, if the person elected were before the Parson or Vicar of any Church Presentative, or Dean of any Cathedral, or held any other Episcopal Dignity, doth not *ipso facto* make void in Law such former Benefice, or Dignity, or Deanry, because he is not compleat and absolute Bishop merely by such Election, but onely Bishop elect; And an Election onely of such one to a Bishoprick, who had before a Benefice with Cure, or any other Ecclesiastical Dignity or promotion, doth not make a Cession thereof. And it hath been adjudged, that a *Commendam retinere* made to such a person of such a Parsonage Deanry, or other dignity Ecclesiastical, which the said Parson had before his Election to the Bishoprick, is yet good to him notwithstanding such Election, and so remains good to him until his Consecration^d.

(3.) Confirmation hath various senses according to the different Acceptation of the word; but here it is mainly intended for that, which in order to an Investiture of a Bishop, is done by the Archbishop or Metropolitan of that Province in which a Bishoprick is Rep.

S

void,

^c 20 Ed. 3. Fitz. tit.

Brief. 25.

^d Trin.

^e 11 Jac. C. B. in Colt, and the Bp. of Coventry and Litchfield.

Hob. Rep. & Evans and Afcough's Case, Litch.

void, and unto which a new Bishop is to be invested, with such usual Beneditions and Ceremonies as are requisite to the same ^c.

* Vid. Stat. 25 H.3. c.20. **Note**, That before an Archbishop, or other Bishop, is confirmed, consecrated or invested, he must take the Oath of *Faalty* unto the King's Majesty onely, after which the King, under his great Seal, doth signifie his Election to one Archbishop, and two other Bishops; otherwise unto four Bishops within his Majesties Dominions, thereby requiring them to *confirm* his Election, and to consecrate and invest the person elected. After which *Confirmation* and Consecration he is complete Bishop to all intents and purposes, as well to Temporalties as Spiritualties. And now he hath *plenam potestatem tam Jurisdictionis quam Ordinis*; and may therefore after his Consecration certifie an Excommengment; and upon his *Confirmation* the power of the Guardian of the Spiritualties doth cease ^f, and a Writ for Admission of a Clerk to a Benefice, awarded *Episcopo electo & confirmato*, hath been held to be good ^g. Likewise the King may by his Letters Patents, after such Confirmation and before Consecration grant unto such Bishop his Temporalties ^h, which Grant from his Majesty is held to be *potius de gratia quam de jure*; but if the Bishop of one Diocese be translated to a Bishoprick in another, there needs no new Confirmation of him. In the Canon [*de Confirmatione Episcoporum*] of Orhobon's Constitutions, it is ordained in *hac verba*, viz. *Ut cujus Electionis Episcopalis Confirmatio postulatur, inter cetera super quibus Inquisitio & Examinatio precedere debet secundum Canonum Instituta: illud exactissime inquiretur, utrum plura Beneficia cum animarum cura, qui electus est, antequam eligeretur, habuerit: Et si habuisse inveniatur, an cum eo super hoc fuerit dispensatum: Et an Dispensatio, si quam exhibuerit, vera sit, & ad omnia beneficia, que obtinuit, extendatur. Et si in aliquo Præmissorum, is ad quem Confirmatio spectat, Electum deficere sua discussione compererit: eidem nullatenus munus Confirmationis impendat.*

* 18 Eliz.

Dyer 350.

* 22 E. 3. 13.

* 41 E. 3. 6.

& 46 E. 3. 22.

Orhobon. de
Confirm. Ep.
cap. unic.

* West.

Symb. par. 1.

lib. 1. Sect.

500. F. N. B.

fo. 169. b.

226. h. 271.

d. 163. g.

Litt. lib. 3.

e. 9.

(4.) There is also Confirmation of another kind, and far remote in sense from the former, not of any Ecclesiastical consideration, nor of any Affinity with the other, otherwise than nominal, and that is the ratifying or confirming of an Office, or an estate in a Place or Office, to one who hath or formerly had the possession thereof by a good Title, but voidable, though not actually and at present void. To explain this; A Bishop grants his Chancellourship by Patent to one for term of his Natural life: this Grant is good to the Patentee, and not in it self void; yet upon the Bishop's death it is voidable, unless it be corroborated and ratified by the Confirmation of the Dean and Chapter ⁱ. This is not the Confirmation here intended, but the Confirmation of the Election of a new Bishop in order to his Consecration and Investure; which though heretofore

was by the Bishop of *Rome*, when he claimed a Spiritual Jurisdiction in this Realm; yet now since the *Stat.* of 25 *H. 8. c. 20.* the same is at his Majesty's Command performed by the Archbishop or Metropolitan of the Province wherein such Bishoprick is void, and two other Bishops; otherwise by four such Bishops within his Majesty's Dominions, as to whom under his Broad Seal, he shall signify such Election, commanding them to confirm the same, as also to consecrate and invest the person whose Election to the Bishoprick is so confirmed as aforesaid.

(5.) The Confirmation of the Election of Bishops to vacant Sees according to the Canon Law, and as practised in such Kingdoms beyond Sea, where the Pope doth claim and exercise a Spiritual Jurisdiction, is, as to the mode and solemnity thereof, quite another thing to what the practice is with us in this Realm.

(6.) In *France*, though the Nomination of a Bishop to succeed in a vacant See belongs to the *French King*, yet if he doth not nominate within six or nine months next after the death of the former Bishop, *Jus devolutum est ad Papam*^{*}; if a Bishoprick be there void, be it *quomodocunque*, whether by Cession or otherwise, the Law speaks indefinitely in that case, the King shall nominate in *France* who shall be the new Bishop; but then he must nominate within six or nine months, which being elapsed, and no Nomination, he cannot afterwards nominate, *Nam jus est ad Papam devolutum: nec poterit purgare moram*¹. For the Law in that case and in that Kingdom is, that *Nominatio non facta intra sex menses, devolvitur nominatio & plena dispositio Episcopatus ad Papam*. As also appears in that remarkable Case controverted touching the Confirmation of the Election, *Ad Episcopatum Appamiarum*; for upon the death of *Cardinal de Albret*, *An. 1520. 10. Dec.* that Bishoprick became void; whereupon the Canons of that Church convened, and proceeded to the Election of a new Bishop, and chose *D. Bernard de Lordat*, who being elected, applied himself *Archiepiscopo Tholosano, tanquam suo Metropolitanano, saltem Vicariis suis*, for the Confirmation of his Election, which was done accordingly; to which Confirmation the *Procurator Regius* was not called, who appealed from the said Election and Confirmation, alledging that the Nomination to the Bishoprick belonged to the King, who nominated *D. John de Puis* to the Pope; whereupon the Pope granted the said Bishoprick to the said *John de Puis*, who by the *Bulls* and *Proxies* of the Pope took possession thereof. From all which Appeal was again afterwards in *supremam Curiam*, between *de Puis* and *Lordat*; but *de Puis* obtaining another Bishoprick, the Process on the Appeal was extinct, and *Lordat* by a Definitive

^{*} Cap. ne pro defectu de Elect. c. 2. de concess. Præbend. Cy in Sect. 1. de Regia Nomina. Pet. Rebuff. Respons. 14. ¹ Gloss. & EE. in dict. cap. 2. de concess. Præbend.

^m Rebuff. ubi supra.

CHAP. VI.

Of Consecration.

1. What Consecration signifies; the ancient Rites and Ceremonies thereof under the Law; who they were to whom it belonged.
2. Consecration, as specially applicable to Bishops.
3. An ancient Canon touching the consecration of Churches.
4. The Form of consecration of Churches by the Justinian Law, the Rites and Ceremonies therein used by the Greek and Latin Churches.
5. Consecration of Bishops how necessary by the Imperial Law, Consonant to the practice of the Greek and Latin Churches.
6. Consecration of Bishops is Character Indelebilis at the Common Law.
7. Who first consecrated Churches; who first took the style of Pope; The Original of Godfathers and Godmothers in Baptism.
8. In case of Translations of Bishops no need of new Consecrations; Requisites to Creation and Translation of Bishops according to the Common Law of England.

(1.) **C**ONSECRATION here chiefly refers either to Bishops or Churches: The Civil as well as Canon Law takes notice of both^a. It signifies a Dedication to God; Justinian in his *Novels* makes use of the word, thereby signifying an Imposition of hands^b: For in this manner (says that Book of great Antiquity, entituled, ΠΡΑΞΕΙΣ ΤΩΝ ΑΠΟΣΤΟΛΩΝ) began Bishops to be consecrated. It is a kind of Separation of persons Ecclesiastical from the Laity, and of things sacred from prophane, for the especial use and service of God. The word in the Hebrew signifies a filling of the hand, thereby intimating, that under the Law in the Consecration of any, there was a giving them, or Putting into their hands things to offer, whereby they were admitted to their Priestly Office^c. In this Consecration the holy Unction was used, or the holy Oil, or holy Ointment, which was not to be applied to any prophane or Civil use, but to be appropriated to the Sons of Aaron; onely whereas Kings were and are to be anointed, that is to be understood, as by special command from God^d, as an Exception to the Sacerdotal practice, and as a consecrating them to the Government; in relation whereto a King is a mixt person under a double capacity, Ecclesiastical and Civil, as next under God the Supreme in Church and State within his own Dominions. And although

^a L. 3. si quando, C. de Bon. vac. & 24. q. 1. c. Pudentia, & Jul. Patric. in Version. Nov. 6. ^b di. Nov. 6.

^c Exod. 29. 9. ^d 1 King. 19. 15. 16. & 1 King. 1. 39. & 1 Sam. 16. 12. Pl. 89. 20.

though under the *Levitical Law* there was an anointing Oil, common to the High Priest, with the inferiour Priests*; yet the High Priest had a *Consecration* peculiar to himself, which was by the pouring out the precious Ointment upon his head^f. In imitation whereof are Kings at this day anointed to the Regal Authority.

* Exod. 29.
^f Lev. 8. 12.
 Exod. 27. 9.
 Psal. 133. 2.

(2.) The import of this word [*Consecration*] as practicable in all Ages, specially refers to Archbishops and Bishops, and with us consists in certain Benedictions and Ceremonies peculiarly requisite thereunto; And when after Election and Confirmation the person is consecrated and invested, he is then compleat Bishop, as well to Temporalities as Spiritualities, and then the power of the Guardian of the Spiritualities doth cease. Being consecrated he may confer Holy Orders upon others, and may consecrate Churches and Chapels, which before he could not. *Anselm*, Archbishop of *Canterbury*, deprived divers Prelates for receiving Investiture of King *H. 1.* but after they were restored *ex gratia*, Speed 436. The *Roman Synod* made a Canon, that Investiture belongs to the Pope; yet *H. 1.* used to give Investiture, as he did to *Ralph*, Archbishop of *Canterbury*. Sp. 440. b.

(3.) Touching the Consecration of Churches, the learned Sir *H. Spelman* makes mention of a very Ancient Canon made by the Synod held at *Celichyth* in the Year 816. under *Wulfred*, Archbishop of *Canterbury*, and President of the said Synod. *Kenulph*, King of *Mercia*, being thereat also personally present; The Canon is to this purpose, viz. *Wherever a Church is built or erected, let it be sanctified by the Bishop of the proper Diocese: Let it have a Benediction from himself, and be sprinkled with Holy Water, and so be made a compleat Church, in such manner as is prescribed in the Ministerial Book. Afterwards let the Eucharist, which is consecrated by the same Bishop, be together with other Reliques, reposited and laid up in a Chest, and kept and preserved in the same Church. And we ordain and command, that every Bishop take care that the Saints, to whom their Churches are dedicated respectively, be painted on the Church-walls, or in Tables, or on the Altars.*

* Spelm.
 Confil. Synod.
 Celichyth.
 Can. 2.

(4.) The Emperour *Justinian* in his care of the Church, hath prescribed a Form of Consecration thereof in this manner; viz. his Law is, *That none shall presume to erect a Church, untill the Bishop of the Diocese hath been first acquainted therewith, and shall come and lift up his hands to Heaven, and consecrate the place to God by Prayer: and erect the Symbol of our Salvation, viz. the venerable and truly precious Road*^b. Likewise among other Ceremonies of Consecrating Churches, the laying of the first Stone was of Ancient use in the *Greek Church*, as may be observed out of their *Euchologue*,^c 131. where

^b Auth. d:
 Monach S.
 illad igitur.
 Coll. 1. vid.
 Novell. 123.

where it is said, *That the Bishop, after some other Rites performed, standing in the place where the Holy Altar shall be set, saith certain Prayers, which being ended, he giveth the Ite Missa est, and then taketh up one of the Stones, and having cut a Cross upon it, himself with his own hands layeth it upon the Groundwork, as the first Foundation-stone; then he pronounceth the ΕΒΕΛΗΘΙΣΤΕΝ ΑΥΤΩ, &c. and so the Workmen begin the building.* The like Ceremonies are used in the Latin Church at this day at the Consecration of Churches, as appears by their Pontificale¹; There is this farther touching the Consecration of Churches in the *Enchologue* of the Greek Church, *That the Bishop having on his Formalities, fumeth the Ground-work or Foundation with his Incense Circular-wise, then the Singing-men say a kind of Collect for the Saint to whose Name the Church is dedicated, and some other Services as the Chaunter shall appoint.* So that although the Patron might chuse the Ground, yet the Prelate was to come and consecrate it; the Patron might bring the Stones, but the Bishop laid the Foundation; the Workmen might with the Materials make a House, but the Bishop by the Consecration made it a Church; It was but the dead body of a Temple, till it received the being of a Church by the influence of the *Diocesan*. Thence it was that the privilege of a new Church followed not the Building, but the Consecration thereof, as was well observed by that Devout and Learned King *Alured* in the fifth Canon of his *Ecclesiastical Laws*, where he saith, *That if a man pursued by his Enemy flee to the Temple, no man shall thence take him away for the space of seven days; which Law was yet made a Caution, That this freedom shall not be granted to any Church, but such as shall be consecrated by the Bishop.*

¹ Pontificale,
pag. 281. per
Clement. 8.
An. 6565.

(5.) Consecration relating to the person, office and dignity of a Bishop (as in the former part of this Chapter) was by the Imperial Law so necessary to the making him a Bishop complete, as that without it his Election and Confirmation would not have entituled him to any Church that should be new erected within his Diocese, whereunto he being consecrated, had a right and Title; as is evident not onely by the Emperours Novel, but also more peculiarly acknowledged by the Σταυροποιον, or the setting up of the Cross behind the Altar when he made the Consecration. Thus the *Enchologue* for the Greek Church. The like also is observed in the *Latin*, where the Ceremonies are more tedious and elaborate. By the setting up of the said Σταυροποιον, the Right of the new Church was conveyed to the Patriarch or Bishop as by an especial Title, and that not onely by the *Enchologue* in the Greek; but also by the Emperour's Novel in the *Latin* Church; Concerning which Right, and the conveyance thereof by the Σταυροποιον, observable to this purpose is that Synodical Sentence given by Ger-

manus, Patriarch of *Constantinople*, against *John* Archbishop of *Lepanto*, touching certain Episcopal Monasteries, whereon he had illegally fixed his Cross under pretence of a Right to the same.¹ Jus Græc. Lat. To. I. Synod. 1. 232, 233, &c.

(6.) This Consecration, specially as it refers to Bishops, is *Character indelibilis*, inasmuch that although it should so happen, that for some just cause he should be deposed or removed from the See, or suspended *ab Officio & Beneficio*, both from his Spiritual Jurisdiction, as to the exercise and execution thereof, as also from the Temporalties and profits of the Bishoprick; yet he still retains the Title of a Bishop, for that it is supposed the Order it self cannot absolutely be taken from him¹. King *H. 1.* banished *Thurstan*, Archbishop of *Tork*; for five years, for receiving Consecration from the Pope, *Speed* 440. b. 458. b. 1 21 H. 6. 2. by Markham.

(7.) It appears by good Chronology, that the first that ever consecrated Churches was *Enginus*, who was a *Greek*, and Priest of *Rome*, and was the first that ever styled himself *Pope*, *An. 154.* who wrote *de Trinitate & Unitate Dei*. He was the first that decreed, that Churches should be consecrated, with the consent of the Metropolitan or Bishop; and that there should be one Godfather, and one Godmother at Baptism². 2 Plat. Berg. Chrisp. Ila- ac. Stat. Ephem.

(8.) In a Case of Translation the Bishop need not to be consecrated *de novo*, as in Case of Creation³. Anciently and according to the Canon Law, and where the Pope's Spiritual Power and authority was in force, Bishops were not so much by Election as by Postulation, and then the saying was *Electus Postulando, & Postulatus obligando*; and in that case the Elected was a Bishop presently, without either Confirmation or Consecration, onely by the Assent of the Superiour⁴. Before Consecration the Bishop hath not actual possession, although he hath a Freehold in Law after Consecration: But, in case of Translation there is not any new Election, nor may the Dean and Chapter pray a *Congé d'Eslire* but they signifie to the King how their Bishoprick is void, & *ideo humillime postulamus Humbricensem Episcopum fore Episcopum nostrum*, and that is called, *Postulation*; and then if the King grant it, he is the Bishop. *Trin. 12 Jac. B. R. Sir Jo. Vaughan's Case vers. Ascough, Roll. Rep. Postulatio est alienius persona ad dignitatem, vel Societatem Fraternalam, Canonica facta vocatio: vel est persona, que eligi non potest, ad eligendum petitio. Cap. innotuit, § habito. de Elect.* The Bishop of *Saint P.* was chosen Bishop of *Trevers*, and had the Assent of the Pope, and when he came there, he found another in possession; whereupon he would have returned to his former Bishoprick, but could not, because it was void before by the consent of the Superiour. And in the Case of *Evans* and *Ascough*, it was said, *That a Bishop* 3 Case Evans & Ascough. Latch. Rep. 4 Sum. Roll. Postulation, & tit. Si. ques Pa- norm. 2. p. 106.

hath been summoned to Parliament before his Confirmation; but, as Jones there said, That was after his Possessions or Temporalties were restored to him. And Calthrop there said, That in the Case of Translation of a Bishop there are five things to be performed, 1. The Chapters Intimation of the death of their Bishop, praying Congè d' Eglise. 2. Congè al eux d' Eglise. 3. A Certificate of the Election. 4. The Assent of the Bishop and the King. 5. The Writ to the Archbishop to confirm and install him; because in such case of Translation he shall not be consecrated de Novo, as aforesaid. But Consecration is necessary to the making of him a Bishop who was none before, and is the fourth Act in order to a Bishop, according to the enumeration of these steps and degrees thereunto, which in the said Case of Evans and Alcough is mentioned by Whitlock; where he saith, That in the making of a Bishop when a Bishoprick is void, the course is, 1. To obtain a Congè d' Eglise. 2. The King's Letters Missive, whom they shall chuse. 3. Upon the Election three Instruments thereof; one whereof to the party Elected, another to the Archbishop, a third to the King, certifying him of the Election, and then there is an act of Assent to the Election, which cannot be without his Assent. 4. The King's Writ to the Archbishop to consecrate and install the person elected. 5. Then the Archbishop issues forth a general Citation, and therein doth prefix a certain day for the Confirmation, which is done accordingly, and then he is consecrated. Then the new Bishop Swears Fealty to the King, which being done, the King orders him his Temporalties: so that there are three principal Acts required to the making of a Bishop; The Election is as the Solicitation, the Confirmation is the Contract, the Consecration is the Consummation of the Marriage: Answerable whereunto, said Dodderidge in the Case aforesaid, are the Acts of making a Parson: As 1. Presentation, whereto answers the Election of a Bishop. 2. Admission, to which Confirmation answers. 3. Institution, which is as the Consecration; and Induction as the Restitution of the Temporalties. The Spiritual Marriage between the Church and the Bishop *initur per Electionem, contrahitur per Confirmationem, & consummatur per Consecrationem*; and the Restitution of the Temporalties is as the bringing home of the Wife.

p In dist.
Case, Evans
& Alcough.

C H A P. VII.

Of Deans and Chapters.

1. What a Dean is, why so called; what Dean and Chapter signifies; and what Deans Rural are.
2. The Division of Deans according to the Civil and Canon Laws; a Question in Law touching the Deanry of St. Martins.
3. Two ways of creating Deans; and in what other senses the word or style of Dean is applicable.
4. Four sorts of Deans according to the Law of the Land.
5. The Patronage of Deanries is in the Crown.
6. The Dean and Chapter of a Cathedral, is a Corporation Spiritual.
7. A Deanry consists of two parts; The difference between a Dean, Prebend and Parson; and that Deanries and Archdeaconries are Ecclesiastical dignities.
8. Chapter, what; the several acceptations of that word.
9. The difference between Capitulum and Conventus in the Canon Law.
10. The description of a Chapter as to their Constitution and Government.
11. Whether one Bishop may have two Chapters?
12. Whether the Lease of a Parsonage in one Diocese, annexed to a Prebend in another, made by that Prebend, be good without the Confirmation of that Bishop in whose Diocese the Parsonage is?

(1.) **D**EAN (*Near à Dec's, decem*) is an Ecclesiastical Magistrate, so called, because anciently he presided or had power over Ten Canons or Prebends at the least. *Sed dicuntur Decani Rurales, eo quod Decem Clericis sive Parochiis præsent.* *Secund. Papiam, Lindw. de Constit. verb. Decan. Rurales gloss.* Dean Rural, because he usually had charge over Ten Countrey Parishes. Anciently also called *Archipresbyter*, because other Presbyters were under his charge. Here in England he is commonly called a Dean who is next under the Bishop, and chief of the Chapter ordinarily in a Cathedral Church, the rest of that Ecclesiastical Society or Corporation being called *Capitulum*, the Chapter. Dean and Chapter is a Body Corporate Spiritual, consisting of many able persons in Law, viz. the Dean (who is chief) and his Prebends, and they together make the Corporation. And as this Corporation

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may

may jointly purchase Lands and Tenements to the use of their Church and Successors: so likewise every of them severally may purchase to the use of himself and his Heirs. After the death of a *Prebend*, the *Dean* and *Chapter* shall have the Profits^a: And after the death of a *Dean* of a Free Chapel belonging to the King, the King shall have the Profits of the *Deanry*; for it is at his pleasure whether he will collate a new *Dean* to it^b. It is likewise held, that a *Deanry* is a *Spiritual Promotion*, and not a *Temporal*, by all the Judges^c: And if the *Nomination* and *Patronage* of a *Deanry* be at the appointment of the King, his Heirs and Successors, and he appoint a *Dean*, yet it is a *Spiritual Promotion*^d. The King makes the *Corporations* of *Dean* and *Chapter*^e. The *Chapter* of the Bishop consists of a *Dean* as the chief, and of the *Prebendaries*, or the like, which are commonly called the *Chapter*^f. As to the Bishop and *Chapter*, which are but one Body, their possessions are divided, so as the Bishop hath a part for himself, and the *Chapter* the residue^g. And their possessions also for the most part are divided, the *Dean* having one part alone in right of his *Deanry*, and each particular *Prebendary* a certain part in right of their *Prebends*: the residue the *Dean* and *Chapter* have alike; and each of them is to this purpose incorporate by himself^h. In the Cathedral Churches of St. *David's* and of *Landaff* there never hath been any *Dean*, but the Bishop in either is Head of the *Chapter*; and in the Bishop's absence, in the *Chapter* at St. *David's* and at *Landaff*, the *Archdeacon*. There are also some *Deans* in *England* without any Jurisdiction, only for Honour so styled; as the *Dean* of the *Chapel Royal*, and *Dean* of the *Chapel* of St. *George* at *Windser*: And some *Deans* there are without any *Chapter*, yet enjoying certain Jurisdictions, as the *Dean* of *Croydon*, the *Dean* of *Battel*, the *Dean* of *Bockin*, &c. In the Case of the *Dean* and *Chapter* of *Norwich* it is said, That in Christian Policy it was thought necessary, (for that the Church could not be without Sects and Heresies) that every Bishop should be assisted with a Council, viz. a *Dean* and *Chapter*, (1.) To consult with them in deciding of difficult Controversies of Religion; to which purpose every Bishop habet Cathedram. (2.) To consent to every Grant the Bishop shall make to bind his Successors; for the Law did not judge it reasonable to repose such confidence in him alone. At first all the Possessions were to the Bishop, afterwards a certain portion was assigned to the *Chapter*; therefore the *Chapter* was before they had any Possessions, and of common right the Bishop is Patron of all the *Prebends*, because their Possessions were derived from him: So that so long as the Bishoprick continues, the *Dean* and *Chapter* (being his Council) remains. This word [*Dean*] is diversly used by *Lindwood*ⁱ, who speaking

^a 33 E. 3.
Ayd del Roy
103. per.
Thorp.
^b Ibid. per.
Fif.

^c D. 10 El.
273. 37.

^d Ibid.

^e 14 H. 8.
3. b.

^f 17 E. 3.
47. b. per
Parning.

^g 40 E. 3. 23.
Coke 3. Rep.
75. b.

^h 17 E. 4.
76.

17 Ass. pl. 29.
18 E. 3. 36.
F. N. B. 195.

Coke 3. Dean
and Chapter
of Norwich,
Case 40 &
41 Eliz.

ⁱ Lindw. pro
Const. iii. de
Constit. verb.
per Decanos
Ruales.

ing of *Dean-Rurals*^k, he describes them to be certain persons that have certain Jurisdiction Ecclesiastical over other Ministers and Parishes near adjoining, assigned unto them by the Bishop and Archdeacon, being placed and displaced by them: Such are the Dean of *Croydon* in *Surrey*, the Dean of *Batle* in *Kent*, the Dean of *Burian* in *Corntball*, &c. These *Deans Rural* are *Decani Temporales*, constituted to some Ministerial Function under the Bishop or Archbishop*. They are certain Ecclesiastical persons having certain Offices commonly belonging to the Bishop and Archdeacon, and therefore to either of them belongs the receiving or removing of them; and their Office is temporal, not perpetual, as is the Office of the Deans of Cathedral and Collegiate Churches, and other Churches quibus perpetuo intrinsecantur^l.

(2.) The Civil and Canon Laws do chiefly take notice but of three sorts of *Deans*; the one, he who is empower'd and set over Ten Soukliers^m. Another, he who is called *Dean Rural*, as aforesaidⁿ. The third is, a *Dean* of a Cathedral or Collegiate Church, as aforesaid^o. There is also the *Deanry* of *St. Martin le Grand*, *London*, concerning which *Lindwood* puts the question. Whether it be such an Ecclesiastical Benefice as in effect may incur such penalties, as may possibly happen to other persons Beneficed? And after deep inquiries into the Laws, Precedents and Antiquities foreign and domestick, with very delectable variety of great Learning^p *hinc inde* argumentatively, and *pro & con* impartially, at last doth conclude it in the Affirmative, *Lindw. Confrat. tit. de Cohab. Cleric. & Mnl. c. ut Clericalis*, verb. Beneficiati.

(3.) As there are two Foundations of Cathedral Churches in England, the Old and the New: (the New being those which King *H. 8.* upon the suppression of Abbies, transformed from Abbat or Prior and Convent, to *Dean and Chapter*) So there are two ways or means of creating these *Deans*; for those of the old Foundation were raised to their dignity much like Bishops: the King first issuing and granting his *Congè d'Eslire* to the *Chapter*, the *Chapter* thereupon making their Election, the King then yielding his Royal assent, and the Bishop confirming him, and giving his Mandate to install him. But those of the New Foundation are by a much shorter course install'd by virtue of the King's Letters Patents, without either Election or Confirmation. *Deans* of the Old Foundation (before the suppression of Monasteries) arrive to their dignities much like Bishops; But *Deans* of the New Foundations (upon suppression of Abbies or Priors, transformed by *H. 8.* into *Dean and Chapter*) are by a shorter course install'd by virtue of the King's Letters Patents. Without Election or Confirmation it was said by *Hobart* in *Brigg's Case*, that a *Dean and Chapter* are a Body Spiritual, and

* Decretal.
Extr. de Offic.
Arch.
Dean Rurals,
what. Decani
Rurales sunt
Decani Tem-
porales, ad
aliquid Mini-
sterium sub
Episcopo vel
Archiepiscopo
exercendum
Constituti.
Lindw. de Const.
c. 1. Gloss. in
verb. Decan.
Rural.
Lindw. ib.
They were
anciently cal-
led, Testes
Synodales.
Idem de
Judic. ver.
Decan. Rur.
C. de De-
canis, l. 12.
per totum.
Exer. de
Censib. c. cum
Apostolus.
Exer. de
App. c. dilec-
tis filiis.

annexed to the Bishop throughout all England, *Brigg's Case* in *Winch. Rep.* The same word is also applied to divers that are the chief of certain peculiar Churches or Chapels, as the *Dean* of his Majesty's Chapel, the *Dean* of the *Arches*, the *Dean* of *St. George's* Chapel in *Windſor*, &c. *Nec Collegio alicui præſecti, nec Jurisdictione ulla donati, Nomine tamen velut honoris gratia Inſignes*, ſays the Learned *Spelman*.

» Co. par. 3.
Caſe Dean
and Chap. of
Norwich.

(4) Each Archbiſhop and every Biſhop hath a *Dean* and *Chapter*; and whereas it was formerly ſaid, *That the Civil and Canon Laws do chiefly take notice but of three ſorts of Deans*, it is manifeſt, that there are four ſorts of *Deans* or *Deanries*, whereof the *Laws* of this Kingdom do take knowledge. The *firſt* is a *Dean* who hath a *Chapter* conſiſting of *Canons* and *Prebendaries*, as aforeſaid, ſubordinate to the *Biſhop*, as a *Council* aſſiſtant to him in matters *Spiritual* relating to *Religion*, and in matters *Temporal* relating to the *Temporalties* of his *Biſhoprick* &c. The *ſecond* is a *Dean* who hath no *Chapter*, *Preſentative*, having *Cure* of *Souls*; he hath a *Peculiar*, and a *Court* with *Eccleſiaſtical Jurisdiction* therein; he is not ſubject to the *Viſitation* of the *Ordinary*: Such is the *Dean* of *Baſſet* in *ſuſſex*, a *Deanry* founded by *William the Conquerour* in memory of his *Conqueſt*; who though he be *preſentable* to the *Biſhop* by the *Patron*, and admitted to the *Deanry* by *Inſtitution* and *Induction* by the *Biſhop* of *Chicheſter*, yet is exempt from his *Viſitation*. The *third* is, whoſe *Deanry* is not *Preſentative*, but *Donative*, nor hath he *cure* of *Souls*, but is only by *Covenant* or *Condition*; he hath a *Court* and a *Peculiar*, holding *Plea* of matters *Eccleſiaſtical* ariſing within his *Peculiar* over divers *Pariſhes*. Such a *Dean* conſtituted by *commiſſion* of the *Metropolitan*, is the *Dean* of the *Arches*, the *Dean* of *Bocking* in *Effex*, and divers others. The *fourth* is the *Rural Dean* aforeſaid, having no *abſolute judicial power* in himſelf, but is only by the *direction* of the *Biſhop* or *Archdeacon*, to order and prepare *Eccleſiaſtical* affairs within his *Deanry* and *Precinct*; the power of theſe *Rural Deans* is at this day nigh *extinguiſhed* by the *Office* of the *Archdeacon* and the *Biſhop's Chancellor*; yet in ſome parts of this *Realm* it is ſtill in force.

(5.) Of theſe four ſorts of *Deans*, the *firſt*, as was ſaid, hath a *Chapter*, being an *Eccleſiaſtical Governour* *Secular* over the *Canons* and *Prebendaries* in the *Cathedral Church*, as the *Dean* of *Canterbury*, *St. Pauls*, &c. The *Patronage* of all which *Deanries* is in the *Crown*, and doth not belong to any *Subject*. Alſo, the new *Deanries* (as was formerly hinted) which were tranſlated from *Priories* and *Covents*, or were after the diſſolution of *Abbies* and *Monaſteries* Founded by *King H. 8.* or other *Kings* of this *Realm*, are now *Donative*, and the *Deans* thereof are by the

the King's Letters Patents Installed: but the Ancient Deans of Chapters are (as Bishops) by a *Congè d' Eslire*, and are after confirmed by the Bishop.

(6.) The Dean and Chapter of Canterbury are, during a Vacancy of that Archbishoprick, Guardians of the Spiritualties, to whom the Stat. of 25 H. 8. of *Dispensations*, giveth power of Dispensation when that See is vacant ⁹. The Dean and Chapter of any Cathedral make ⁹ *Colt.* and a Corporation Spiritual, and at the Common Law challenges are allowed where the Issue concerns a Corporation, and they to make ⁹ *Glover's Case* the Pannel, or where any of their Body are to go on the Jury, or any ⁹ *vers. the Bishop of Coventry and Lichfield.* of kin unto them, though the Body Corporate be not directly a party to the Suit: A Dean and Chapter bringing an Assize, a Juror was ⁹ *Hob. Rep.* challenged, because he was Brother to one of the *Prebendaries* ⁹, and the challenge for that reason allowed ⁹. If a Dean take an obligation to him and his Successours, it goes to his Executors; which holds ⁹ *Vid. 15 E. 4. 19. 28 Ass. 18. 21 E. 4. 11.* true also as to a Bishop, Parson, Vicar, &c. ⁹ *Day's Case vers. Savage Hob. Rep. Arundel's Case, Hob. Rep.*

(7.) A Deanry consists of Two parts, viz. *Officium & Beneficium*; The *Officium* hath two parts, the one is *Dignity* and *Jurisdiction*, the other is *Administration*: But some Promotions are mere Administrations, as *Prebends* and *Parsons*, which are not Dignities, because they have not Jurisdiction, 11 H. 4. But an *Archdeacon* hath a dignity, because he hath a jurisdiction ⁹. So hath a *Dean*, to whom anciently (according to *Lindwood*) the *Canons* made their Confessions, *Et quod Canonici quoad curam animarum subsunt Decano*, ⁹ *Lindw. de Panis. c. 1. gloss. in verb. vel Decano, & in ver. Decanum & Capitulum.* Who ought to visit his Chapter, 5 E. 3. 7. and if a Prebend be made a *Dean*, the Prebendary is void by Cession, 5 E. 2. F. Brief. 800. Also a *Dean* may make a Substitute as to the matters of his *Jurisdiction*, as for Corrections, or Visitations; but not as for the other part, viz. the *Administration*: for which reason he cannot make a Deputy to confirm leases, and the like ⁹. So that in a *Deanry Cathedral* there seems to be, (1.) *Dignity* and *Jurisdiction*, (2.) *Office* and *Administration*, (3.) the *Benefit* or *Profits* thereof; which seems very clear, for that a *Parson*, a *Prebend*, or the like, hath not Dignity, but onely the Office or Administration, with the Profits; but a *Dean*, who hath Administration as others, hath also Jurisdiction and Dignity. The Law is also the same as to an *Archdeacon*, 11 H. 4. 40. 7 H. 6. 27. 27 H. 6. 5. And a Writ brought against a *Dean* is good and sufficient without his proper Name, because it is of it self a Name of Dignity: And that a *Deanry* is a Dignity, appears by 5 E. 3. 9. *Breve* 800. as aforesaid; and it is an Office also, for that in ancient times, a *Dean* took the Confessions of his *Prebends*, as was likewise hinted before. Also a *Dean* may by his Dignity make a Deputy to correct, &c. but not as to his ⁹ *Dist. Case. Evans and Ascoug.*

7 Case Evans
verf. Alcongh.
in primo loco.
Larch. Rep.

his judicial Office, as to confirm Leases, and the like 7. By the Canon Law, he that is the Archipresbyter, is also called Dean, *scil. Presbyterorum vel Ecclesie. Cap. ad hac, de Offic. Archidiacon. Cano. innovamus, 60. Distinct.* And because the Dean of a Church (understand it of the Roman Church) *in locum Archipresbyteri subrogatus est. Roma Decis. 451. in novis. & rursus, in Decis. 443.* The Archipresbyter was so called, because he was in some certain matters and causes set or appointed over the Priests or Presbyters, and such as were of the Sacerdotal Office, specially in the absence of the Bishop; *cap. 1. & 2. de Offic. Archipresb.* The Dean is such a dignity, that the Canon Law styles him, *honorabiliorem partem Capituli; cap. post Electionem, c. 7. de Concess. Prebend. c. cum inter ca. 18. & ibi Panor. & gloss. de Elect.* And in a large sense a Dean may be said to be the chief of any that are of the same state and order; *Gloss. in rubr. de Decanis, lib. 12. C. & ibi & Alceat.* and so the Canons of the Church of Constantinople, *tanquam digniores*, were by Honorius and Theodosius called *Decani: E. non plures 4. de Sacros. Eccles. lib. 1. C. tit. 5.* and the more honourable *inter Rose Auditores*, is the Dean of the Pope's Chapel, *propter Ministerium, quod vocatur Mithra. Lud. Gomef. in proem. ad Reg. Cancell. de Prothonotariis.* The truth is, the Canon Law in express terms says, that *Deconatus*, or a Deanry, *est Nomen speciale dignitatis: Cap. cum illis vero, §. illis de Prebend. in 6.* that is, when it refers to preeminency in any Church Cathedral or Collegiate; *Gemin. Conf. 131. nu. 9. ver. expressit. de Deconatu.* For as the *Deans Rurali*, it is otherwise: *Cap. licet Canon. de Elect. in 6.* the dignity, *quæ talis*, belonging properly to the other, *viz. Decano Capituli*, who is *Caput principale ipsius*; yet under the notion or appellation of a Chapter, the Dean thereof is not comprehended, unless he be specially mentioned or nominated: *Rebuff. in Tract. nominat. q. 8. nu. 33. & Barbosa in 3. Decret. c. post Electionem. de Concess. Prebend. nu. 3.*

(8.) Chapter, *Capitulum*, so termed by the Canonists, not properly, but metaphorically, *quasi a Little head*, or a kind of Head not onely to rule and govern the Diocese in the Vacation of the Bishoprick, but also when the See is full to assist the Bishop as a Council, by way of Advice in matters pertaining to the Diocese: *Vid. Panor. in Cap. Capitulum, extra de Rescript.* The Chapter consisting of a Dean, Canons and Prebends, is *Clericorum Congregatio sub uno Decano in Ecclesia Cathedrali*; or it signifies, *Congregationem Clericorum in Ecclesia Cathedrali, Conventuali, Regulari vel Collegiata.* Of these Chapters some are Ancient, some New; the New are those which were founded or translated by King H. 8. in the places of Abbats and Covents, or Priors and Covents: Or those which are annexed unto new Bishopricks founded by H. 8. as were *Bristol, Chester and Oxford.* This word *Capitulum*, or Chapter, hath (in addi-

addition to the Premises) other significations in *Lindwood's Provincials*, where he speaks de *Capitulis Ruralibus*, of Chapters Rural, *Lindw. tit. de Consis. cap. quia incontinentie*, gloss. verb. *Capitulis Ruralibus*; and there acquaints us with no less than six significations of this word. Sometimes (says he) it is taken for the place, in quo sunt *Communes tractatus Collegiatorum*. Sometimes it is taken for the place, in quo sunt *Discipline delinquentium*: *Cap. Reprehensibilis in fi. Extr. de Appell.* Sometimes it is taken pro *Decretali vel alia certa distinctione Sacra Scriptura*: *Cap. cum supr. Extr. de Sepult.* Sometimes it is taken pro *Capitulis Ruralibus*, as aforesaid, that is, when in *Locis minus insignibus*, viz. in *Rure Constitutis*, known by the name of *Conventus* in *Otho's Constitutions*: *Cap. Sacramenta, ad finem, ver. Conventib.* Sometimes it is taken for a Collection of persons, *ad invicem de his quæ eis incumbunt in Locis ad hoc assignatis tractantium*; and being taken in this sense, it may be understood sometimes for persons congregated in a Metropolitan or Cathedral Church, and sometimes for persons congregated in a Church Conventual, Regular or Collegiate: and each of these last may in a large sense be said to be a Collegiate Church, according to the description thereof, viz. That *Ecclesia Collegiata est Collectio hominum simul viventium*; but to speak properly, that is *Capitulum*, which is respectu *Ecclesie Cathedralis*: That *Conventum*, which is, respectu *Ecclesie Regularis*: and that *Collegium*, which is respectu *Ecclesie Inferioris*, ubi est collectio conventium in Communi. And sometimes *Capitulum* is taken for a Collection of many persons not living in common, sed ob tractatus Communes inter se habendos, ad aliquem locum confluentium; according to which, a convening together of many Rectors, Vicars, and other Ecclesiastical persons, ob tractatus communes inter se habendos, etiam dicitur *Capitulum*. *Panorm. Lindw. ubi supra.* *mian* understands it, pro *Collectione*, seu pro *Collegio ipsorum Canonico- rum*; but withall says, it hath divers significations, all which he comprizes in this one Verse,

Distinguit, minuit, locat, & Collectio fertur.

Distinguit, when one Subject is distinguished from another in any Tract or Treatise: *Minuit*, when it stands diminutively, *Capitulum*, quasi parvum Caput, as aforesaid, understand it secundum modum: *Locat*, when it is taken for the Place it self where the Canons are met or conven'd: *Collectio*, and so it is taken pro ipso Collegio, as aforesaid; *Panorm. de Rescript. Extr. c. Capitulum.* Whereof there are three inseparable signs, as one common Seal, one common Stock or Treasure, and one common Head or Rector.

(9.) By

(9.) By the *Canon Law* the words *Capitulum*, *Conventus*, *Catus*, and *Concilium*, are as it were Synonymous; but the terms, *Capitulum* and *Conventus*, are frequently used Promiscuously: But to speak properly according to the Law, *Conventus* is said to be *Congregatio Ecclesie Regularis*; and *Capitulum* or a *Chapter* is said to be *Congregatio Ecclesie Secularis*^a. The word [*Chapter*] taken (as here) in a proper Canon-sense, is a name collective having a Plural signification; yet in reference to different things, may be accommodated as well to the Singular as the Plural.

^a Gloss. ibid.

(10.) A *Chapter Ecclesie Cathedralis*, consists of persons Ecclesiastical, Canons and Prebendaries, whereof the Dean is chief, all subordinate to the Bishop, to whom they are as assistants in matters relating to the Church, for the better ordering and disposing the things thereof, and for confirmation of such Leases of the Temporalities and Offices relating to the Bishoprick, as the Bishop from time to time shall happen to make^b. It seems that at the Common Law, by the Gift or Grant of Lands to a *Dean and Chapter* (being a Corporation aggregate) the Inheritance or Fee-simple may pass to them without the word [*Successors*,] because in Construction of Law such Body Politick is said never to die^c. This must be understood onely in reference to their taking of the thing granted, in their Politick, not Natural capacity.

^b Co. 3. par.

Case of the Dean and Chapter of Norwich.

^c *Hugh's Parl. Law*, cap. 3.

(11.) One *Bishop* may possibly have two *Chapters*, and that by union or consolidation, as in the Bishop of *Waterford's* Case, who had the Bishoprick of *Lismore*, and the Chapter thereof united to that of *Waterford*: In which Case although the Chapter of *Lismore*, onely confirmed the Grants of Lands belonging to *Lismore*, and the Chapter of *Waterford* onely confirmed the Grants of Lands belonging to the Bishoprick of *Waterford*; yet because the Union there was not extant, the Judges held the Confirmation in manner aforesaid to be good; but otherwise all the Judges held, that both Chapters ought to have confirmed^d: For it seems if a Bishop hath two Chapters, both must confirm his Leases^e.

^d Co. 12. 71.

a. b.

Dy. 282. p. 26.

Sir Sim. Degg's Parl. Counsel. par. 1. c. 10.

^e *Temp. R. 2. Fitz. tit. Grant* 104. *Hugh's Parl.*

Law, cap. 5.

Herbert and

Munday's Ca.

Cro. par. 1.

(12.) A *Parsonage* in the Diocese of *W.* is annexed to a *Prebend* in *S.* the *Prebend* makes a *Lease* for years, which is confirmed by the Bishop, and Dean and Chapter of *S.* It was held by the Court to be good, without the Confirmation of the Bishop of *W.* in whole Diocese it is. In *Eyre's Case* it was resolved, That Chapters are not of a capacity to take by Purchase or Gift without the Dean, who is their Head. And in the Case of *Eaton-College*, where a Lease was made by the Dean and Chapter of the College of *Eaton*, whereas

Mwre's Rep.

whereas they were incorporated by the Name of the *Dean and Chapter* of the College of *St. Maries of Eaton*; Resolved, that the Lease was void for the *Misnomer*. Yet, whereas the Dean and Canons of *Windsor* were incorporated by Act of Parliament, by the Name of the Dean and Canons of the King's Free-Chapel of *his Castle of Windsor*, and they made a Lease by the Name of the Dean and Canons of the King's Majesty's Free-Chapel of *the Castle of Windsor*, in the County of *Berks*: Resolved, the Lease was good; For although the King in the Act of Parliament calls it *his Castle*; yet when another speaks of it, it is more apt to call it *the Castle*, and therefore such variance shall not avoid the Lease. Likewise, whereas *Christ's-Church* in *Oxon* is incorporated by the Name of Dean and Chapter *Ecclesia Cathedralis Christi de Oxon*: and they made a Lease by the Name of Dean and Chapter *Ecclesia Cathedralis Christi in Academia de Oxon*; and the Liberties of *Academia* did extend farther than the Liberties of the City; yet it was adjudged a good Lease, because the substance of the Corporation was inserted in the words of the Lease.

3 & 4 M.
Eaton College
Case. More
ibid.

Pasc. 6 Eliz.
More. ibid.

The Lord
North's Case.
More's Rep.

C H A P. VIII.

Of Archdeacons.

1. *What Archdeacon is; his Office and Jurisdiction.*
2. *The several kinds of Archdeacons; and how many in England.*
3. *Whence the Archdeacons power is derived, and whether a Quare Impedit doth lie of it or not?*
4. *In what Case Action lies against an Archdeacon, for refusing to give Induction to a Clerk instituted by the Bishop.*
5. *Archdeaconry not comprised under the notion of a Benefice with Cure of Souls.*
6. *Process of Quorum Nomina prohibited by the Canon to be issued by any Archdeacon.*
7. *How often an Archdeacon may have his Visitation; and what his Office or Power therein is.*
8. *How a person ought to be qualified, that may be an Archdeacon: It is an Ecclesiastical Dignity*
9. *Cardinal Otho's Constitution touching the Archdeacon's government in his Visitations.*
10. *How Archdeacons are distinguished at the Canon Law.*
11. *Conformity thereto in the practice of the Common Law.*
12. *A Case at Common Law, touching a Lease for years of a Glebe made by an Archdeacon.*
13. *The same Case somewhat otherwise reported.*
14. *Whether a Quare Impedit lies of an Archdeaconry.*

(1.) **A**RCHDEACON, from [*Archos*] *Princeps*, or Chief, and *Diaconos*, Deacon, that is, the first or chief of the Deacons: *Sum. Host. de Offic. Archid. & c. 1. de Scrut. in Ord. fac.* being (according to the Canon Law) such as hath obtained a Dignity in a Cathedral Church, to have the Priority among the Deacons, and first in Jurisdiction next after the Bishop; *Sum. Host. ibid.* For as of Common Right all Ecclesiastical matters within the Diocese appertain to the cognizance of the Bishop, so under him to the Archdeacon, excepting onely such things as by Law are specially prohibited^a. And therefore is said to be dignified with this Title, for that in many things he doth supply the room of the Bishop, to whom he is in precedency to others subservient, and unto whom his service chiefly relates^b. Every Bishop (be it Archbishop or other) hath under him an Archdeacon for the better discharge of his Cure, He hath Jurisdiction of Common right,

Philip, a fifth Son of Lewis the Gros, K. of France, disdained not to be an Archdeacon in Paris. Paul Emil. Titius.

^a *Sum. Ibid.*

^b *Can. Legimus, 93. Dist.*

right, which may vary according to circumstances and the Custom of the place; and therefore in some cases it is *Jurisdicio Ordinaria*, in others it is *Delegata*. And although regularly (as such) he doth not exercise any Jurisdiction within the Church it self, yet it cannot be denied, but that an Archdeaconry is an Ecclesiastical Dignity: *Fran. de Aret. in Concil. 23.* His Office and Jurisdiction by the *Canon Law* is of a far larger extent, than is now practicable with us, otherwise we should not there find him so frequently styled *Oculus Episcopi*, for that he is by the very Law the Bishop's Vicar in several respects, and therefore may (where the Bishop himself conveniently cannot) keep the *Triennial Visitations*, or not oftner than once a year, save where emergent occasions do require it oftner. He hath also under the Bishop the power of Examination of Clerks to be ordained, as also of Institution and Induction; likewise of Excommunication, Injunction of Penances, Suspension, Correction, Dispensations of hearing, determining and reconciling of Differences among the *Clergy*: as also of enquiring into, inspecting, and reforming Abuses and Irregularities of the *Clergy*, with a power over the Subdeacons, and a charge of the Parochial Churches within the Diocese. In a word, (according to the practice of, and the latitude given by the *Canon Law*) to supply the Bishop's room, and as the words of that Law are, *in omnibus vicem Episcopi gerere*, *Synt. jur. l. 15. cap. 20. de Archidiacono.*

(2.) The Dioceses within this Realm of *England* are divided into several Archdeacons, they being more or less in a Diocese according to the extent thereof respectively, and in all amounting to the number of Threescore: And they divided again into Deanries, which also are subdivided into Parishes, Towns, and Hamlets. Of the Archdeacons some are by *Prescription*, some by Law^d, and some by *Covenant*. Which difference hath this Operation in Law, That the Jurisdiction of an Archdeaconry by *Prescription*, or *de jure*, is exclusive to the Jurisdiction of the Bishop, insomuch that a Prohibition lies for such Archdeacon against the Bishop, if he intermeddle Juridically with any matters or things within such Archdeacons: Otherwise it is where the Archdeaconry is only by *Contract* or *Covenant* made between the Bishop and the Archdeacon; for in that case, if the Bishop so intermeddle within the Jurisdiction of such Archdeacon, or hold Plea within the same, he can have but an Action of *Covenant* against the Bishop, and no Prohibition lies in that case^e. The Cognizance which the Archdeacon hath, is of matters merely Ecclesiastical, to which end he or his Commissary may hold his Court, where, and in what places the Archdeacon either by *Prescription* or *Composition* hath Jurisdiction

Clergy, from Kness, Portio, they being in a peculiar sense, as the Lord's Portion.

There are 60 Archdeacons in *England*:
^c 47 Ed. 3.
²³ Co. par.
^{5.} *Cawdry's Case.*
^d 8 H. 6. 3.
per Chauntrel.
 The Archdeaconry of *Richmond* is by *Prescription*.

^e *Trin. 2 r.*
Jac. B. R.
Castrell and Jones Case.

24 H. 8. jurisdiction in Spiritual Causes within his Archdeaconry; and from him the Appeal is to the Diocesan^f.

C. 11.

Co. Inst. par.

4. cap. 74.

Trin. 31

Eliz. C. B.

Smallwood

vers. Bishop

of Lichfield.

Leon. Rep.

Sir Timothy

Hutton's Case

C. B. Hob.

Rep.

Pasch. 23

Eliz. C. B.

Ad judg.

Godb. 23. vid.

F. N. B. 47.

26 H. 8. 3.

by Knightly.

Pasch. 31

Eliz. B. R.

Underhill

and Savage's

Case. Leon.

Rep.

St. 21 H. 8.

13.

(3.) An Archdeaconryship being onely matter of Function, and (as supposed) not properly Local, nor any Indenture made of it, it hath been some question heretofore, whether a *Quare Impedit* doth lie of it, or not? But it was held in the affirmative, for that an Archdeacon hath *Locum in Choro*^g. The power of an Archdeacon was derived from the Bishop, and to him he is subordinate: To which purpose the opinion of the Court in *Hutton's Case* upon a *Quare impedit* was, That if a Suit be before an Archdeacon, whereof by the Statute of 23 H. 8. the Ordinary may license the Suit to a higher Court; that the Archdeacon cannot in such case balk his Ordinary, and send the Cause immediately into the *Arches*: for he hath no power to give a Court, but to remit his own Court, and to leave it to the next; for since his power was derived from the Bishop, to whom he is subordinate, he must yield it to him of whom he received it; and it was said in that case, that so it had been ruled heretofore^h.

(4.) If after the Clerk hath been presented by the Patron, and admitted and instituted by the Bishop, the Archdeacon shall refuse to induct him into the Benefice, an Action upon the Case lieth for the Clerk against the Archdeaconⁱ. He hath power to keep a Court, which is called the *Court of the Archdeacon*, or his *Commissary*; And this Court is to be holden where and in what places the Archdeacon either by *Prescription* or *Composition* hath Jurisdiction in Spiritual Causes within his Archdeaconry. And from him the Appeal is to the Diocesan.

(5.) Although by the Canon Law, if one having a Benefice with Cure of Souls, accepts an Archdeaconry, the Archdeaconry is void; yet it is conceived, that upon the Statute of 21 H. 8. 13. the Law is qualified in that point, by reason of a *Proviso* there, viz. *Provided that no Deanry, Archdeaconry, &c. be taken or comprehended under the Name of a Benefice, having Cure of Souls, in any Article above specified*; and to this Opinion did *Wray*, and the other Justices, incline in *Underhill's Case*^k. And indeed an Archdeaconry, by the exprefs Letter of that Statute, is exempt from being comprehended under the name of a *Benefice with Cure*; for the words are, *That no Deanry, Archdeaconry, Chancellourship, Treasurership, Chanteriship, or Prebend in any Cathedral or Collegiate Church, nor Parsonage that hath a Vicar endowed, nor any Benefice perpetually appropriated, shall be taken or comprehended under the name of a Benefice having Cure of Souls*^l.

(6.) By the Ecclesiastical Constitutions and Canons of the Church of England, no Archdeacon (nor indeed any other Ecclesiastical

clesiastical Judge) may suffer any general Process of *Quorum Nominis* to issue out of his Court: Except the names of those to be cited be first expressly entered by the Register or his Deputy under such Process, and both Process and Names first subscribed by such Archdeacon, or other Ecclesiastical Judge, or his Deputy, with his Seal thereto affixed. And in places where both the Bishop and Archdeacon do by *Prescription* or *Composition* visit at several times in one and the same year, the Archdeacon or his Official, shall within one month next after the Visitation ended that year, and the Presentments received, certifie under his Hand and Seal to the Bishop or his Chancellour, the Names and Crimes of all such as are presented in his said Visitation, to the end the Chancellour may not convent the same person for the same Crime, for which he is presented to the Archdeacon; which course the Chancellour is in like manner to observe, in reference to the Archdeacon, after the Bishop's Visitation ended. The which was ordained, to prevent the Prosecution of the same party for the same fault in divers Ecclesiastical Courts^m. And in cases of remitting Causes from the Inferiour Judge, the Archdeacon cannot remit the Cause to the Archbishop; but he must remit it to his Bishop, and he to the Archbishop, *Trin. 11 Jac.*

(7.) The Archdeacon within the Jurisdiction of his Archdeaconry may by virtue of his Office have his Visitation, if he so please, or need shall require, once every year; but of necessity he is to have his *Triennial* Visitation: *Lindw. de Offic. Archid. c. 1. verb. Visitatione gloss.* But whether of common right, and by the *Jus Commune*, the Archdeacon may visit within the Jurisdiction of his Archdeaconry is some question, yet resolved by distinguishing whether the Visitation be made *per modum Scrutationis simplicis* by the Archdeacon, as the Bishop's Vicar, and so he may visit of common Right: but if in such Enquiries he take upon him *nomine suo proprio* to correct Faults, other than such small ones as wherein Custome may warrant him; in such case it is held, that he hath not power of Visitation *de jure communi*: *Lindw. ibid.* And in all such things as belong to his Visitation he hath Jurisdiction, and by Custome over Lay-persons, as well as over the Clergy: It seems therefore he may doe all such things, as without the doing and dispatch whereof his Jurisdiction could not clearly appear; *L. cui Jurisdictio ff. de Jurisd. om. Jud.* and therefore wherever he may take cognizance of a matter, there he may also give sentence and condemn; *Extr. de Caus. Poss. & prop. c. cum Super. & de Offic. Deleg. c. ex Literis*, which is supposed to hold true by Custome, and inasmuch as the cognizance and reformation of such matters do belong to the Ecclesiastical Court; whence it is that an Archdeacon may impose

impose a penalty on Laymen for the not repairing their Parish Church within his Jurisdiction; *Extr. eod. c. ult. & Extr. de Offic. Ord. c. 1. & Lindw. ubi supr. verb. Imperitiam*. For it is expressly enjoined and ordained, That Archdeacons and their Officials, shall at their Visitation of Churches, take the condition of the Fabrick thereof into special consideration, specially of the Chancel; and in case there be need of Reparations, shall set or fix a time within which such Reparations shall be finished, which time is likewise to be set under a certain penalty: *Lindw. de Offic. Archid. c. Archidiaconi*.

(8.) By the Canon Law a man cannot be an Archdeacon under the age of 25 years; *Can. Nullus in propositum, 60. Dist.* And by the Council of Trent he ought to be a Licentiate in Law or Divinity; *Conc. Trid. 8. Sessio de Reform. general. Can. 12.* They are called the Chief of the Deacons; *C. 1. de Scrutin. in ord. faciend.* in whom there is an Ecclesiastical Dignity inherent *jure Communi*: And in some places they have this Dignity *sine Officio*; for Innocentius observes, That in *Ecclesia Parmensi Archidiaconus nullum exercebat Officium, & nihilominus dignitatem habet*: Innocent. in *c. de multa de Præbend.* But regularly, according to the Canon Law, Archdeacons, as to their Dignity, Office and Degree, are to be reputed according to the Law, Usage and Custome of their own Church and Chapter; *Hoftiens. Sum. de Offic. Archid.* The Archdeacon is *Oculus Episcopi*, and *ipso jure* his Vicar in Visitations, Corrections, and Dispensations in matters Ecclesiastical within his Jurisdiction, he hath power of reforming the Clergy, of examining and presenting to the Bishop such as are to be ordained, and of putting into possession such as are Presented, Instituted and Inducted into Ecclesiastical Benefices.

(9.) Cardinal Orho, in his Canon *de Archidiaconis*, hath Ordained, That all Archdeacons do prudently and faithfully visit the Churches within their respective Archdeaconries, as touching the Sacred Vessels and Vestments thereof, and generally to enquire into the Temporalties and Spiritualties belonging to the same, and that they endeavour to amend what they find amiss: Also, that they grieve not the Churches with superfluous Charges or Expences, but require onely moderate procurations in their Visitations; wherein they may not presume to receive money of any when Crimes are to be corrected or punished, nor Sentence any unjustly, on purpose to extort money from them, on pain of double the Summ to pious uses at the discretion of the Bishop, besides other Ecclesiastical punishment, *Constit. Othonis, de Archidiaconis*.

(10.) The Canon Law doth distinguish of Archdeacons; the whole Title throughout [*De Offic. Archidiacon.*] regularly speaks of

of an Archdeacon General, who hath not any Archdeaconry distinctly limited, *Sed tanquam Vicarius fungitur vice Episcopi Universali*, and doth represent the Bishop: *Extra. de Consue. non putamus.* Otherwise it is in him who hath a distinct Limitation of his Archdeaconry, for then he hath a Jurisdiction separate from the Bishop, which, where it is by Custome, may be prescribed: *Gloss. in ver. Visitatione dist. Const. Otho.* Consonant to this seems that difference which the Judges took in the Case between *Chiverton* and *Trudgeon*, wherein they held and agreed, That there is a Jurisdiction of one Archdeacon, and there is the Jurisdiction of another, which is but a peculiar Jurisdiction; for the Archdeacon is an Officer who hath a Court of his own, in which he hath the Probate of Testaments *de jure*: And *Doderidge* Justice said, *That he is a principal Officer belonging to the Bishop, & est quasi Oculus Episcopi*; but otherwise it is of one who hath but a special Jurisdiction, as the Archdeacon of *Richmond* hath to make Institutions; and (so) 21 H. 6. 23. the Dean of *Pauls* in that case hath special Authority in *St. Pancriddle*, *Hill. 17 Jac. B. R. Case Chiverton and Trudgeon*: *Rolls Rep.*

(11.) In the Case between *Gastrell* and *Jones*, it was said by *Ley* Chief Justice, That it is to be considered, what Authority the Archdeacon hath in his own nature, as such, and what power he may have by Prescription, or otherwise: The Archdeacon is a Minister subordinate to the Bishop, viz. Deputy and Vicar, or an Officer under him; for, in case of Induction, the Bishop's Warrant is necessary to empower him to give the same; He hath also Judicial power, but it is not exclusive to the Episcopal Authority, but the Bishop is his Superiour: Both are Judges, but the one subordinate to the other, &c. And if Sentence be given in the Archdeacon's Court, the Appeal thence shall not be in the Bishop's Court, but in the Archbishop's: And if a man dies Intestate, having goods within the Archdeacon's Jurisdiction, and other goods within the Jurisdiction of the Ordinary, the Archbishop (as he said) shall commit the Administration to the Archdeacon.

(12.) The Archdeacon of *H.* having the Parsonage of *A.* appropriate to it, Lett the Land parcel of his Glebe for fifty years, in *Anno 12 Eliz.* The Bishop of *E.* Patron of the Archdeaconry, and the Dean and Chapter confirm it; The Archdeacon dies, another is collated to the Archdeaconry. It was the Opinion of the Justices in this Case, first, That the Confirmation by the Bishop was not void, for that it was but an Assent onely to the Lease of the Possession of the Archdeaconry, and not of the Bishop, and therefore not within the Statute of 1 *Eliz.* The second Point was, Whether this

this Lease was void by the Statute of 13 Eliz. *Quare*, for not Resolved, *Mich. 37 & 38 Eliz. B. R. Sir Edw. Denny and Eakenstall's Case*, Cro. par. 1.

(13.) The same Case Reported by *More*; An Archdeacon having a Parsonage appertaining to his Archdeaconry before the Statute of 13 Eliz. made a Lease for forty years of the Parsonage, which was confirmed after the Statute; adjudged the Lease and Confirmation both good, *Arkingfall*, or *Eakenstall*, and *Denny's Case*, *More's Rep.*

(14.) A *Quare Impedit* was brought by the Executors of J. S. for not suffering them to present to the Archdeaconry of D. which became void in the life of the Testator, and the Writ and Count both supposed a disturbance to the Testator in his Life, *In nunc repudiationem Executionis Testamenti pradii*. In this Case it was Resolved, (1.) That a *Quare Impedit* did lie of an Archdeaconry. (2.) That the Writ as brought should abate, because it was *in nunc repudiationem*, which cannot be of a Disturbance in the life of the Testator. But it was agreed, that the Executors might have a special Action upon the Case for their Disturbance, *Trin. 31 Eliz. B. R. Smallwood and the Bishop of Coventry and Maribus Case*, Cro. par. 1.

CHAP. IX.

Of Procurations, Synodals and Pentecostals.

1. Procuration, *what; whence so called; and how paid.*
2. *Whether Procurations be onely due ratione Visitationis?*
3. *Procurations Anciently paid in Victualibus, and not in Money; how paid to Archdeacons in Lindwood's time.*
4. *Whether Procurations may be payable by Custome to Archdeacons sine Visitatione?*
5. *Archdeacons to Visit personally; if otherwise, then how the Procurations are payable?*
6. *Not above one Procuration to be paid; how that is to be understood.*
7. *The Number of the Visitor's Attendants by the Council of Lateran in reference to Procurations; and how many an Archdeacon may have by the Canon.*
8. *Synodals, the threefold signification of that Word.*
9. *The Synodal anciently called Cathedraticum and Synodaticum: what the Cathedraticum was, why so called; the Original thereof, and how it differs from Procuration.*
10. *Pentecostal, what it is; when, by, and to whom payable; the probable Original thereof.*
11. *A remarkable Case relating to this Subject, that was Resolved and Adjudged in Ireland.*

(1.) **T**HE Ordinary at his Visitation may by the Canon require his Synodals or Procurations, *Ext. de Cens. c. Procuraciones*; that is, a certain Cense or Tribute in money paid to the Bishop or Archdeacon by the inferiour Clergy at *Easter-Visitation*; called *Synodale* or *Synodaticum*, *quia in Synodo frequentius dabatur*. So that these *Procurations* are no other than certain summs of money which the Parochial Clergy do annually pay to the Ordinary or Archdeacon *ratione Visitationis*. Anciently they were paid in provisions of Victuals necessary for the Visitor and his Attendants, now converted into money instead thereof: So that this *Procuratio* is by *Vallensis* aptly defined, *Necessariorum sumptuum exhibitio, quæ ratione Visitationis, debetur ab Ecclesia vel Monasterio ei cui ex officio incumbit ius & onus Visitandi, sive is sit Episcopus, sive Archidia-* *ratiss, de Cen-
lib. 5. 3.*
conus, sive Decanus, sive Legatus summi Pontificis, An-1290. M. quod die Mercurii in Festo Sanct. Lucæ Evang. Dominus Episcopus cepit Procuracionem in Cibis & Potibus apud Bordelly, & pernoctavit

* Giff. fo.
226. b. vid.
Nomo. Lex,
ver. Procurat.

ibidem *. Whence the word *Procuratio* is supposed to have its derivation, even from the duty incumbent on the Visited in *Procuring* of necessary Accommodations for the Visitor and his Attendants as aforesaid; which seems the more probable by what *Duarenus* says, *Hoc autem munus ideo Procuratio vocatur, quia Ecclesia Episcopum procurant, id est, curant, alunt, ac tuerentur.*

(2.) It hath at times been smartly controverted, Whether *Procurations* be due onely *ratione Visitationis*, or whether the payment thereof may legally be enforced without the Act of *Visiting*, and not exclusively to Archdeacons in the years of *Episcopal Visitationis*? For if so, then the foresaid description which *Vallensis* makes thereof, is not adequate enough to the nature of the thing; of which opinion grounded on solid Arguments, is the Learned Anthour of the *Historical Discourse* on this Subject ^b.

^b Stephens
de Procurat.
Edit. 1661.

Extr. de Cen-
sib. c. cum
Apostolum.

(3.) Anciently (as aforesaid) these Visitation-*Procurations*, or *Exhibitio necessariorum sumptuum*, as *Vallensis* calls it, was no other than *Viſtualis*: For by the Council of *Lateran* (not the great General Council under *Innoc. 3.* but that) under *Alex. 3.* above thirty years before, about *An. 1180.* *Visitors* are so directed to proceed in the execution of their *Visitations*, as that *Sumptuosas Epulas non querant, sed cum gratiarum actione recipiant quod honeste & competeret illis fuerit ministratum.* That these *Procurations* were originally paid in *Viſtualibus*, appears by several Constitutions of the Canon Law, *Extr. de Censib. cum Apostolus, & de Censib. c. Roman, §. Procurationes.* *Consuetudo tamen* (says *Lindwood's Gloss*) *operatur in pluribus locis, ut Procuratio hujusmodi sumatur in pecunia que consuetudo bene potest procedere, ut sumatur à Volentibus sic in pecunia Solvere, non autem à nolentibus, Extr. Benediſt. 12. & c. Felicitis, & gl. Lindw. ubi supr.* But that was onely where the Custom prevailed, the Canon anciently being peremptory to the contrary; for in the *Sext.* there is a Constitution made by *Innoc. 4.* (who became Pope *An. 1243.*) and afterwards ratified by a General Council at *Lions* under *Greg. 10.* about *An. 1273.* forbidding (*sub pena Maledictionis eterne*) the taking of Money in lieu of *Procurations* (*vel à Volentibus sic solvere*) *C. 1. §. Procurationes, & c. exigit. eod. in sexto, & ibi Gloss. in casu;* and in the ordinary penalty practised in this case against *Visitors* of any rank inferiour to Patriarchs, Archbishops or Bishops, that should presume to receive *Procurations* otherwise than in *Viſtualibus*, was suspension *ab Officio & Beneficio.* And this way of paying *Procurations ex antiquo*, continued till the time of *Boniface 8.* who succeeding in the Papacy about twenty two years after *Gregory*, made a Constitution about the year 1295. That it should be lawfull to any Visitor (*Volentibus Visitatis*, not otherwise) *vice Viſtualium* to receive, not to exact, Money to-
wards

wards the defraying of their *Visitation-charge*, *Gloss in ver. dispendia, c. Felicis, tod. in sexto*: Which by *Benedict. 12.* in the second year of his Popedom, about 1337. was by a Canon or Constitution limited to a certain sum, according to the quality of the *Visitor*, and the condition of the *Visited*, which may take place, where it is not otherwise limited by custome; the *Procurations* of Archdeacons being in *Lindwood's* time, as he informs us, (which was in *Henry the Fifth's* Reign, above two hundred years since) the sum of seven shillings six pence, according to the number of his *Attendants*, viz. twelve pence to each man, and eighteen pence to the Archdeacon himself, which (comparing the value of money *Then* with the times *Now*) was considerable.

(4.) The Question is not, whether *Procurations* are due *Ratione Visitationis*; but whether they are only due *Ratione Visitationis*, and not otherwise? It is supposed that they are and may be due otherwise than *Ratione Visitationis*; and that therefore Archdeacons may receive *Procurations* in the Lord Bishop's *Triennials*, and yet visit not; for *Custome* seems to lay a just claim to this Ecclesiastical payment of *Procurations sine Visitatione*, where the *Custome* is *Rationabilis & Legitime prescripta*. Time was, when Archdeacons had *jus Visitandi quolibet anno*, and so accordingly did visit, & ea ratione received *Procurations*, *Lindw. de Offic. Archid. c. 1. gl. in ver. Visitation. & Extr. de Offic. Archid. c. Mandamus, gl. in ver. sapimus Visitare*. And sometimes they visit not, as in the Episcopal *Triennials*, yet by the custome do and may receive their *Procurations*; *Pubi supr. &c.* understand this only of some, not all Archdeacons.

(5.) The Canonists define *Procuratio* to be an *Exhibition sumptuum Necessariorum* paid to the Prelates, *qui Dioceses peragrando Ecclesias subjectas visitant*. And it is a Rule in the Canon Law, *Quod nulla est adversus Procuracionem prescriptio, Inst. In Can. l. 2. de Censib.* And by the same Law the Archdeacon is to go personally to the place that is to be visited, and ought not for that purpose to send another; which if he doth not so doe, he is not to receive in *denarius* the *Procurations* due *ratione Visitationis*, *Extr. de Cens. c. Procuraciones*. Notwithstanding the person whom he commissionates for that purpose *Nomine suo*, shall receive the *Procurations* for himself and his *Attendants in Visitationibus*, *Ar. ad hoc de Offic. Ord. c. si Episcopus l. 7. & de Censib. c. 1. & c. Felicis, de Cens. Lindw. glo. de Offic. Archid. c. ut Archidiaconi, ver. videant*. These *Procurations* are called also *Proxies*, *Cenag. & Pentecostal. per an. 64 l. 10 s. ita Archidiaconatus Glouc. valet clare in Proxis*, which is a profit of Jurisdiction. *Archidiaconis inhibemus ne aliquo modo Procuraciones recipiant sine Causa rationabili, nisi illo die quo personaliter visitant, Provin. Constit. de Offic. Archid.*

* Ex Record. Primit. 26 H. 8. vid. Dyer fo. 273. b. & Claus. Rot. 31 E. 1. M. 15. dor. vid. Nomo. Lexicon, ubi supr.

(6.) The Ordinary may not receive above one *Procuracion*, that is, he may not of the same Church exact one *Procuracion* from the Rector, another from the Vicar; if he hath the *Procuracion in Virtualibus* of the Rector, he ought to receive nothing of the Vicar, *nec è contra*; for one *Procuracion* of one Church for one day is held sufficient: *dict. c. Felicitas, de Censib.* Nor do the Canons allow above one *Procuracion*, in case there be more Churches than one *Visited* in one and the same day; the Reason whereof in Law, because the *Visitation* is the *Principal*, the *Procuracion* is but the *Accessory*, and the *Visitation* onely of one day ought not to have the *Procuracions* of more, nor ought the *Accessory* to exceed the *Principal*, *Lindw. ibid. de Censib. c. quamvis, & gl. ib. ver. Canones.* Nor ought there to be paid above one *Procuracion* for the Mother-Church and the Chapel thereto belonging, when they are *Visited*, *Can. ibid. ver. una Ecclesia.* Yet there are *Canonists* of very good Authority, as *Andreas* and others, who holding the contrary, do positively assert, That every Chapel dependent (if Peopled and of ability) shall pay its own proper *Procuracion* at times of the ordinary *Visitation*, for that the Bishop is to have a respect to every individual Member of his Diocese. It is therefore distinguished and confessed, that this is true, when the Chapel dependent hath a Curate proper of its own, and distinct from, or other than the Curate of the Mother-Church: But otherwise when the Rector of the Superiour Church, is a Curate of both, and onely doth exercise the Cure in the said Chapel by a Vicar not Perpetual, but Temporal and removeable *ad libitum*, *Gl. in d. ver. una Ecclesia.* *Lindwood* on this occasion puts the Question, Whether in case the Church be of one Diocese, and the Chapel thereto annexed or united, or dependent thereon, of another; whether in that case there shall at the *Visitation* be but one *Procuracion* paid for both? He resolves it thus, *viz.* That if the Ordinary of the place where the said Chapel stands, hath formerly had there his *Visitation*, and *Procuracion*, *ratione Visitationis ejusdem*; then and in that case the power of *Visiting* the same, nor by consequence the *Procuracion* due *ratione Visitationis*, is not taken away from that Ordinary by such union or dependency, *Gloss. ibid. in ver. Ecclesia.*

(7.) By the aforesaid Council of *Lateran* all *Visitors* were limited to a certain number of *Visitation-Attendants*, according to their several qualities, as Archbishops to the number of forty or fifty men with their Horses; the Bishop to twenty or thirty; Cardinals to twenty five (though they could not digest such an undervaluation) Archdeacons to five or seven; Deans (that is, *Archipresbyters Rurales*, as the *Gloss* expounds it) to Two onely: *Gl. in ver. Decani Extr. cod. c. cum Apostolus. Extr. Com. de Censib. c. vas Electi-*
onis.

omis. And the truth is, the Archdeacon (according to the Canon) may not have his ordinary Visitation above the number of *seven* persons; if he exceed that number, there is not any *Procurations* due for the Supernumeraries, *Lind. de Cens. & Procurat. c. 1. ver. excedant, & glo. ibid. & gl. in ver. Visitationis, & gl. ib. in ver. Debitam.*

(8.) The word *Synodale* seems to have Three significations, as (1.) It seems to signifie *Conventus* or a Meeting, in the same sense with *Synodus*, as being taken for the Meeting or Synod it self, and so used by *Gregory 3.* in his Epistle to the Bishops of the Provinces of *Baiory* and *Almany*, *Catholica Sanctorum Patrum Auctoritas jubet, ut his in anno pro salute populi Christiani seu exhortatione adoptionis filiorum SYNODALIA debent celebrari, &c.* This Epistle you have cited by *Cardinal Baronius*, in the Eighth Tome of his *Annals* about the year 738. (2.) It seems to signifie the *Acts* done at a Synod, as well as the Synod it self; and in this sense you have it in the *Tripartite History*, where mention is made of a Synod of Bishops assembled at *Antioch* out of divers Provinces, who sent the Empe-
Hist. Tripart. l. 7. fo. 452.
 rour *Jovian* a Copy of the *Nicene Creed*, *Hunc Libellum* (meaning the said *Creed*) *in collectione Synodali* *Sabini conscriptum invenimus.* In which place *Synodalia* seems to import the *Acts* of that
Ibid. fo. 352.
 Synod collected by that *Sabinus*. (3.) It signifies a *Cense* or *Tribute* in money paid to the Bishop, or to some other for his use by the inferiour Clergy. The forementioned Authour of the *Historical Discourse* of *Procurations, &c.* acquaints us, That in the
Pag. 78.
 second part of the Appendix to the third General Council of *Lateran* there is an Epistle of *Pope Alex. 3.* to certain Archdeacons and Deans, reproving them for extorting of moneys from the Clergy *sub diversis nominibus*, in a fraudulent kind of way; *Et hujusmodi exactionem* (saith this Epistle) *ut eam liberius videamini exigere, quandoque Consuetudinem Episcopalem, quandoque SYNODALIA, quandoque Denarios Paschales appellantes.* And in this sense is the word *Synodale* here used and taken, which the Archdeacon claims not so much *Jure Communi Ecclesiastico*, as by Composition with, or Prescription from the Bishop.

(9.) This *Synodal* or *Synodical* duty was anciently known by two other Names which now are grown obsolete, the one *Cathedraticum*, probably from the original Cause thereof, being *ob honorem Cathedra Episcopalis*: the other *Synodaticum*, from the time of payment, both used promiscuously. The former of these, *viz.* the *Cathedraticum* was a *Cense* of two Shillings paid by the Inferiour Clergy to the Bishop, as appears by the *Acts* of certain Councils of *Bracar* and *Toledo*, as also by the *Constitutions* and *Rescripts* of *Popes*, *Illud se volumus modis omnibus custodire, ne quis Episcoporum Si-*
ciliz:

cilix de Parochiis ad se pertinentibus, nomine *CATHEDRATICI*, amplius quam Duos Solidos præsumat accipere, 10. q. 3. c. illud, &c. placuit, ibi, &c. So *Honorius* 3. expresteth Two Shillings nomine *Cathedratici*, Extr. de Offic. Jud. Ordin. c. conquerent. & gl. ibid. in ver. duos solidos; which is a Pension paid to the Bishop à qualibet Ecclesia secundum Loci consuetudinem; as *Panormitan*. upon that Text, Abb. c. conquerent. de Offic. Jud. Ord. The reason of this payment was (according to *Hoftiensis*) in argumentum subjectionis, & ob honorem Cathedra, *Hoftiens*. in Sum. de Censib. ex quibus ver. Cathedraticum autem. And the Council of *Bracar*; Placuit ut nullus Episcoporum per suas Dioceses ambulans, præter honorem Cathedra sue, id est Duos Solidos, aliud aliquid per Ecclesias tollat: cited in the Decree, 10. q. 3. c. placuit. Note, that the *Cistercians* by virtue of their Order were privileged from being present at the Synodical Meetings assembled by the Bishop within his Diocese, and from the payments of those Synodals, Gloss. in ver. Episcopus, c. Episcopus non debet, Dist. 18. Extr. de Majoris & Obed. c. 9. Quod sup. & gl. ib. in ver. Diocesana. This *Cathedratic* payment began, when the Revenues of the Church first came to be divided and allotted to several Ministeries; then it was that this payment was first made to the Bishop by the beneficed Clergy within his Diocese, *Duaren*. ut sup. & l. 2. c. 1. fo. 53. It is probable that this division of the Church Revenues was not far distant in time from the first or original distinguishment of Parochial Bounds, upon which affair Pope *Enaristus*, otherwise called *Anacletus Græcus*, did first enter about the year 110. *Volateran*. l. 22. *Anast. Biblioth. & Baron. Annal. ad An. 112. nu. 4, 5, 6.* and was afterwards carried on by Pope *Dionysius*, about the year 260. *Baron. Annal. ad An. 260. nu. 17.* Parochial Distribution in England was by *Theodorus* Archbishop of Canterbury, about the year 668. *Spelm. Concil. 152*: But *Speed* saith, by *Honorius* the fifth, Archbishop also of Canterbury, about the year 636. It may not hence be inferr'd, that this *Cathedraticum* or Synodal was onely paid *ratione Synodi*; for it was sometimes, and very anciently paid also at *Visitations*, as appears by the seventh Council at *Toledo*, mentioned in the Decree, 10. q. 3. c. inter cetera, & casus ibi, where there is a Canon against the exacting of more than Two shillings onely pro *Cathedratico* in Episcopal *Visitations*. This Cense or payment, though it be *Onus Ecclesiasticum*, yet it is not *Onus Innovatum*, but *Onus Ordinarium*, and by imposition of Law; as appears by the Provincial Constitutions, *Solutio Cathedratici, Synodatici, & Procurationum, ratione Visitationis, & alia hujusmodi, de quibus non dubitatur quin sunt Onera Ordinaria, suum capiunt effectum ab impositione Legis*, *Lindw. de Offic. Vic. c. quoniam gl. in ver. Onera Ecclesiastica.* Yet *Procurations* differ from the other in this, that

that *Procuration*s are onely *Pensions*, but the other are properly *Census*. The *Synod* or *Synodal*, is by the Stat. of 34 H. 8. reckoned as a Church-due, for recovery whereof provision is made by that *Rassall* in Act; and good reason, for the said *Synod* or *Synodal*, is a Pension *Pensions, &c.* certain and valued in the King's Books.

(10.) The afore said ingenious Authour of the *Historical Discourse* touching *Procuration*s, &c. after his deep search into *Antiqui-* *Disc. Hist. Disc. of Pro-*
ty, doth conjecturally conceive, that the *Pentecostal*, otherwise *curations,*
called *Whitsanfarthings*, is nothing else but the Annual Commemo- *P. 99.*
ration, continuation or repetition of an ancient payment or pen-
sion, issuing out of the Oblations brought by the people long since,
specially at the time of the Foundation or Dedication of their fe-
veral Churches, or at some other Solemnity, viz. the moiety or
Third part of the Oblations then made. The same being re-
served by the Bishop, and by a Contract (*sen quasi Contradū*) be-
tween him and the Founder of such Church, or Priest assigned to
attend the same, settled in and upon the Episcopal See, and paya-
ble yearly at or about the Feast of *Pentecost*. These *Pentecostalia*
were not (as some conceive) the *Peter-pence* here anciently paid,
for they were usually paid either at the Feast of St. Peter and Paul,
or on *Lammas* day; but these *Pentecostals* seem to be paid upon
or about the time that doth chiefly denominate the same, viz. at
the Feast of *Pentecost*; and in the nature thereof seem to have re-
ference to an Oblation frequently made by the *Christians* in the El-
der times of the Church, and to have some tendency to that *Libe-*
ral Devotion which was then as frequent, as *Sacrilege* is now. In
Leg. 18. *Guilielm. Conquestor, de Denariis S. Petri, sen Vastigalis*
Romano, viz. Liber homo qui habuerit Averia Campestris 30 denariis
estimanda, dabit Denarium S. Petri. Pro 4 denariis quos donaverit
Dominus, quieti erunt Bordarii ejus, & ejus Boner, & ejus Servien-
ter. Burgensis, qui de propriis Catallis habet id quod dimidia Marca
estimandum est, det Denarium S. Petri. Qui in Lege Danorum est
Liber homo, & habet Averia Campestris, que dimidia Marca in ar-
gento estimantur, debet dare Denarium S. Petro. Et per Denarium
quem donaverit Dominus, erunt quieti ii qui resident in suo Dominico.
Vid. Seldeni ad Eadmerum Notæ & Spicilegium, p. 179. Leg. 18.
By this Law of *William the Conquerour* it appears, that the *Peter-*
pence had no affinity with the *Pentecostals*. In ancient times when
the Bishop did visit *Ecclesiastim*, his usage was to celebrate the Mass
in the Church which he visited, which indeed was every Parish
within his Diocese, and that by his Episcopal Authority, the whole
Diocese in respect of the Bishop being by the Law but *Parochia sua*,
10. q. 3. c. *Quia & Duarenus, passim*, as the whole Province is said *Antiq. Eccl. Brit. p. 28.*
to be in respect of the Lord Archbishop of *Canterbury*. At this & 54.

Mass

Dict. Hist.
Discourse of
Procurat.
p. 116.

Ibid.

Mais the people used to make their Offering to the Bishop, and one of the causes or reasons, why or wherefore the People in ancient times were obliged to bring their Oblations to the Church, was *propter Consuetudinem*, and that *certis Festivitatibus*, among which the Feast of *Pentecost* was and is a most special one; at which Feast there was in many places here in *England* an Oblation, Anciently made by inferiour Churches and Parishes to the principal Mother-Church, and whence probably the word *Pentecostalia* had its original denomination. These Offerings by the *Canon Law* were and are onely due to the Clergy, and interdicted to the Laity, *sub districtione Anathematis*, 10. q. 1. c. *Quia Sacerdotes*, &c. *Sanct. Patrum*, *ibi*. In some places the Deans and Prebendaries of Cathedral Churches have them; It is said, That in the Cathedral Church of *Salisbury* there is a greater and a less, distinguished and known by this difference of *Major & Minor pars Altaris*. And in some Dioceses they are settled upon the Bishop and Archdeacon, and made part of their Revenue, for which the King hath Tenths and Subsidies. The Cathedral or the Mother-Church of *Worcester* was Anciently, and before the dissolution, a Priory, and among other Revenues had these *Pentecostalia* or *Whitsonfarthings* yearly paid, *sub nomine Oblationum* or *Spiritual Profits tempore Pentecostes*: After the Dissolution, when King *H. 8.* about the three and thirtieth year of his Reign new founded and re-endow'd the said Church, he restored these *Pentecostalia* (after he had held them about a year in his own hand) to the said Church, which (as it is reported) the Dean and Prebendaries thereof receive at this day, and as appears by the Letters Patent:

Henricus Octavus, &c. Sciatis quod Nos de gratia nostra speciali, ac ex certa scientia, ac mero motu nostris dedimus & concedimus, ac presentes damus & concedimus Decano & Capitulo Ecclesie Cathedralis Christi & beate Mariæ Virginis Wigorn. omnes illas Oblationes & Obventiones, sive Spiritualia proficua vulgariter vocat. Whitsonfarthings annuatim tollere. sive recepta de diversis Villatis in Comitatu nostris Wigorn. Warwic. & Heref. infra Archidiaconatum Wigorn. & tempore Pentecost. oblata dicto nuper Prioratu beate Mariæ Wigorn. modo dissolut. dudum spectant. & pertinent. &c. Ex Archis Decani & Capit. Wigorn.

But in *Glocester*, it seems, it is otherwise; for there the Bishop and the Archdeacon onely receive them; nor can the Dean and Prebendaries, that now are of the Cathedral, make any just claim to them. For before the Suppression these *Pentecostals* were (*inter alia*) valued to the Archdeacon in the King's Books, as part of the Revenue

Revenue of the Archdeaconry. And as for *Procurations* aforesaid, although they are (as Dr. Cosen says) *ratione Visitationis plerumque prestanda*, yet not *solummodo* so; and thence it is held, that they are in some places payable to the Archdeacon *jure Consuetudinario*, even in the Bishops Triennial year, *sine Visitatione*, on the Archdeacon's part.

Dr. Cosen.
Polit. Eccles.
Angl. tab. 8.

(11.) To this purpose Remarkable is that Case of *Proxies*, which Sir John Davis, the King's Attorney General in Ireland, reports to have been there Resolved and Adjudged. The Case was this. The Bishop of *Meth*, before the dissolution of Monasteries, had a *Proxy* of fifteen shillings four pence payable yearly out of the Commandry of *Kells* in the County of *Meth*, parcel of the Possessions of the Hospital of St. John of Jerusalem in Ireland; and one other *Proxy* of twenty shillings, payable yearly out of the Improprate Rectory of *Trevel*, in the same County, parcel of the Possessions of the Abbey of *Thomascourt* in the County of *Dublin*. In the thirty third year of King H. 8. the said Hospital and Abbey were suppressed and dissolved, and all the possessions of both the said Houses were vested in the actual possession of the Crown by Act of Parliament. But in the said Act there is an Exprese, *Saving the Proxies* to all Bishops and their Successours. Afterwards the Bishop of *Meth* and his Clergy (for that Bishoprick hath not any Dean and Chapter) by Deed Inrolled, Dated 16 March, 36 H. 8. granted the said *Proxies* (*inter alia*) to King H. 8. his Heirs and Successours; the King being at the time of the Grant, and after, in the actual possession of the said Commandry and Rectory, out of which the said *Proxies* were payable. Afterwards Queen Elizabeth, by her Letters Patent, dated *primo Novemb.* in the thirty third year of her Reign, demised the said Commandry and Rectory to Dr. Forth. And now whether he shall be charged with these *Proxies*, and the Arrearages thereof, after the commencement of the Lease, was the question: And it was Adjudged, that he should be charged therewith. In the Argument of this Case there were three points moved and debated; (1.) Whether the *Proxies* were wholly extinct by the suppression and dissolution of the said Religious Houses, notwithstanding the said *Saving* in the Act of Dissolution? (2.) Whether the Bishop could grant the *Proxies* to the King? (3.) Whether the *Proxies* in the hands of the King were extinct by the Unity of Possession? For the first point, it was objected by Sir Ambrose Forth's Counsel, That the *Proxies* were extinct by the suppression and dissolution of the Religious houses: For that the *Visitation* of the Religious houses were the sole cause of the payment of the *Proxies*, *Et cessante causa cessat effectus*. For the Religious houses being gone and dispersed, they shall not be afterwards subject to *Visitation*,

Trin. 2 Jac.
in the Exchequer of Ireland, Entre le Roy & Sr. Ambr. Forth
Dr. of Law,
Davis Rep.

and then when the Visitation doth cease, the *Proxies*, being onely *Exhibition given to the Visitor for his Travelling charges*, shall cease also; For *Procuratio* (as the *Canonists* define it) est *Exhibitio sumptuum necessariorum facta Prelatis, qui Dioceses peragrando Ecclesias subjectas visitant*. Yet it was agreed, That the *Visitation* doth not cease immediately upon the Surrender, or by the Act of Parliament, which gives the Religious Houses and their Possessions to the Crown; for by that their Corporations are not dissolved: as was held in the Case of the Dean and Chapter of *Norwich*, Co. par. 3. 15. Aff. p. 8. 32 H. 8. Br. Corporations 78. But when the Religious Persons were dispersed and had relinquished their *Habit, Rule and Order*, for which they were *Visitable*, then their Corporation was utterly dissolved, and thereupon the *Visitation* ceases. And in this case they resembled a *Proxis* due for *Visitation* to an Annuity for Counsel or some other service to be done: if the Counsel or the Service be withdrawn, the Annuity determines. So if a Rent-charge be granted for a Way, stop the Way, and the Rent-charge shall be stoppt also, 9 Ed. 4. 19. 15 Ed. 4. 2. 21 Ed. 3. 7. So where a *Corodie* is granted for certain Service to be done, the omission of the Service determines the *Corodie*, 20 Ed. fo. ult. It was also said, That the duty is not annual, but contingent, and payable onely upon every *Visitation*. And for the [Saving] they said, it was a *Flattering Saving*, which could not preserve the *Proxies* in being, which the Law had extinguished; as was held 14 Eliz. Dyer. 313. That the tentres of the *Obit*, or Chantry-Lands, held of the Subjects, are extinct by the Act of 11 Ed. 6. notwithstanding the *Saving* in the said Act, *propter absurditatem*: So the *Proxies* in this Case shall be extinct *propter absurditatem*. For as it is absurd, that the King should be subject to Attendance in respect of a Tenure: so it is absurd, that the King should be subject to *Visitation*, or to any duty in respect thereof. Of the same nature there are many *Savings* pubin *Walsingham's Case*, Plow. Com. 563. which are there called *Flattering Savings*. As to the Second point it was objected, That the Bishop could not grant these *Proxies* to the King for two Reasons; the one drawn from the person of the King, the other from the person of the Bishop. (1.) For the King, Admit that he were capable of such a Spiritual Office, as to be a *Visitor* of Religious persons, yet he shall not have *Proxies*, by reason of the *Inconvenience and Inducency*, and also for the *Impossibility* thereof; For it is neither *Convenient* nor *Decent*, that the poor Religious persons should bear the Charges of the King; And it is also *Impossible*, for by the Canon Law, *Procuratio exhibenda est secundum qualitatem personae Visitante*; and the Majesty of the Person of the King, and the grandeur of his Train is such, that by presumption of Law no pri-

vate person can bear his necessary charges, or make him entertainment answerable to the quality of his person. (2.) For the Bishop, Although he may grant his Temporal possessions with the Assent of his Chapter or Clergy, yet those duties which he hath by the prerogative of his *Episcopal Chair*, or as incident to his Spiritual Function, he may not grant; And they by the Rule of the *Canon Law* are of Three sorts, viz. (1.) *Subsidium Cathedralium*, which is a duty of Prerogative and Superiority. (2.) *Quarta Episcopalis*, which was given to him for Reparation of Churches. (3.) *Procuraciones*, for his Visitation, as aforesaid, which is a perquisite or profit of his Spiritual Jurisdiction. As to the Third point, they said, That although a *Proxie* is a Personal thing, payable onely in respect of persons *Visitable*, yet admit that these *Proxies* are become Real, and that the Commandry and Rectory are charged with these *Proxies*, then the unity of possession doth extinguish them in the hands of the King, as a Seignory, Rent-charge, Common, and the like, are extinguished by the purchase of the *Terre-tenant*, if he hath the like estate in the Land, and in the thing which charged the Land. And to this purpose was cited the Case of 2 H. 4. 19. a. where a Prior had an Annuity out of a Parsonage by Prescription; the Parsonage is after appropriate to the Priory, the Annuity is extinguished for ever. But on the other side, it was answered by the King's Council, and Resolved by the Court, That the said *Proxies* were not extinguished by the dissolution of the said Religious Houses, but were well preserved and saved to the Bishop; and the Bishop had well granted them to the King, and the unity of possession in the hands of the King made but a Suspension and no Extinguishment of the said *Proxies*. (1.) As to the First point, it was first observed, that these *Proxies* had not their original in the primitive Church; for St. Paul, in visiting all the Churches which he had planted in *Asia* and *Europe*, demanded not any *Proxies*, but laboured with his own hands for his subsistence, lest he should be burthensome to the Churches. Yet long after this, the *Canon Law*, which declares that *Proxies* are due to Bishops in their *Visitations*, says, that it is agreeable to the doctrine of St. Paul, *Ut à quibus spiritualia recipimus, eisdem Temporalia communicemus*, *Instit. Jur. Can. l. 2. c. de Censib.* It was also observed, that that which we call *Proxie* or *Procuracy*, is called by the Canonists *Procuratio*, for that upon every *Visitation* the persons *visitable procurant* necessary Provisions for the Visitors; which Provisions at first were made in *Victuals*, viz. in *Esulentis & Potulentis*, but that was with moderation and temperance, *Ne jejuniorum doctrinam rubentibus buccis pradicant*; But afterwards, when the pomp and excess of *Visitors* required such provisions as were grie-

vous and intolerable to the Churches and Religious Houses, then every Church and such House was reasonably Taxed, and for that every *Proxie* was reduced to a certain sum of money, payable yearly in the nature of a Pension to the Ordinary, who had power of *Visitation de mero jure*, as is said 10 *Eliz. Dyer* 273. b. After the *Procuracion* of Victuals was reduced to a certain sum, the Churches and Religious houses paid it to the Ordinary yearly, albeit he made not any *Visitation*: And so the Rule of *Cessante causa cessat effectus* doth not hold in this case. The certain summs of money which come in lieu of *Proxies*, and retain the name of *Proxies*, are by ancient Composition made parcel of the certain and settled Revenues of the Bishop, do remain for ever, and are not subject to extinguishment. And at this day the King himself pays and allows *Proxies* out of all the Impropriations which he hath in his possession; for which reason in every Lease made by the King of a Rectory Improprate, there is a Covenant on the Lessee's part, that he shall bear and pay all *Proxies*, *Synodals*, *Pensions*, &c. And as for the [*Saving*] in the Act of 33 *H. 8.* cap. 5. it is not an idle or *Flattering Saving*, but real and effectual; for it was agreed before, that these *Proxies* were in being at the time of making the Act, and are not extinguished by the Surrender of the Religious houses; for their Corporations are not dissolved till the Religious persons have relinquished their houses, and are dispersed. And such things as were in being at the time of making the Act, may well be preserved and saved by the Act; albeit the things which were extinct before, cannot be revived by a *Saving*, without express words of *Grant* and *Restitution*. As to the Second point, it was Resolved, That the *Proxies* in their original nature being Duties payable for *Visitation*, are grantable to the King, and the King is capable of such a grant, especially when the said duties are converted to a sum of money certain, in the nature of a Pension or Annuity. For by the ancient Law of the Realm, the King had power to *Visit*, reform and correct all Abuses and Enormities in the Church: And by the Statutes made in the time of King *H. 8.* the Crown was but remitted and restored to his ancient Jurisdiction, which had been usurped by the Bishop of *Rome*, 33 *E. 3.* iii. *Ayd del Roy* 103. *Reges sacro oleo uncti Spiritualis Jurisdictionis sunt capaces.* And *Proxies* are profits of the Jurisdiction 10 *H. 7.* 18. *Rex est mixta persona cum Sacerdote*: So the King shall have Tithes by the Common Law, whereof no mere Lay person was capable, 22 *Affis. pl.* 75. 11 *H. 7.* 1. The King himself may *Visit* his Free Chapels and Hospitals, 8 *Aff. p.* 29. *N. Br.* 42. a. And *Cassana*, in *Carol. Glo. mund. par.* 5. *Conf.* 24. cites a Text of the Canon Law, viz. *Quod omnes Reges dicuntur Clerici*; also another Text,

Text, which saith, *Quod Causa Spiritualis committi potest Principi Laico*. And whereas it was said, that in respect of the grandure of the King and his Train, competent *Proxies* cannot be provided for him, and by consequence a Grant thereof cannot be made to him; that Objection is removed, in that the *Proxies* at the time of that Grant were reduced to certain reasonable summs of money. Also the Rule of the Canon Law was not rightly and fully cited before; for the Rule is, *Procuratio exhibenda est secundum qualitatem persona visitantis, & substantiam Visitorum*. It was also Resolved, that the Bishop with the Assent of his Clergy, might well grant the *Proxies* to the King, for that the Law hath qualified the person of the King to receive such a Grant, albeit it be such a Prerogative of the Bishop as may not be assigned to any other person: As the Creation-money of a Duke or Earl may be granted and surrendered to the King, although it can be granted to a Subject. Also the *Proxies* being now reduced to certain summs of money, and so made part of the certain settled and perpetual Revenue of the Bishop, may be granted by him as well as a part of the Tithes, or an Annuity, or any of his Rents, Services, or other Hereditaments Temporal. And as to the Third point it was also Resolved and Adjudged, That the Unity of Possession of the *Proxies* with the Rectories Improprate and Religious Houses, out of which the *Proxies* are payable, do not extinguish the *Proxies* in the hands of the King, but suspends the payment of them *tantum pro tempore, quousque*, or untill the King by his Grant shall sever the one from the other. To conclude, The Case of *Tithes* is parallel to the Case of *Proxies*, and agrees therewith in all points; For as *Instruction* was the cause of the payment of Tithes: So *Visitation*, which is ever accompanied with *Instruction*, *Littl. ca. de Frankalmoigne 30 b.* was the cause of the *Proxies*. And as Tithes are now due and payable to Laypersons which have purchased Improprate Rectories, although they do not give any *Instruction*: So *Proxies* are due and payable to Ordinaries, out of the Improprations and Religious houses dissolved, although their *Visitation* ceases. And as none can prescribe *de non decimando*, as is commonly held in the common Law: So the Canon Law hath a Rule, *Quod nulla est adversus Procuratorem prescriptio*, *Inst. Jur. Canon. lib. 2. cap. de Censibus*. Also *Proxies*, which resemble Tithes in other points, may be well compared to them in this point, *viz.* That they shall not be subject to extinguishment by unity of possession.

CHAP. X.

Of Diocesan Chancellours, Commissaries, Officials and Consistories.

1. *A Description of the Office of such Chancellours, and how they differ from the Bishops Commissaries.*
2. *The Antiquity and necessary use of such Chancellours.*
3. *What the Canons Ecclesiastical require touching their Office.*
4. *Whether a Divine, that is not a Civilian, may be a Chancellour?*
5. *Where, and before whom the Bishops Consistories are held.*
6. *What is meant or intended by the word Consistory.*
7. *The great Antiquity of the Bishops Consistories.*
8. *That Antiquity farther confirmed and proved.*
9. *The difference between Consistorium and Tribunal.*
10. *Incidents to the Chancellours Office, as he is Oculus Episcopi.*
11. *A short digression touching Administrators.*
12. *The Laws and Canons touching Summoners.*
13. *The Constitutions Provincial, what provision there touching this Office of Summoners.*
14. *A Judgment at Common Law in Action on the Case against an Apparitor or Summoner, for citing a man wrongfully into the Ecclesiastical Court.*
15. *What a Commissary is; how to be qualified; with the Precincts of his Jurisdiction.*
16. *Whether a Commissary may cite persons of several Parishes to appear at his Visitation-Court?*
17. *A Case at Common Law touching a Commissary made by a Dean.*
18. *Whether a mere Lay-person may be a Commissary or Official? Other points in Law touching that Office; and the Grant thereof.*
19. *Sufficiency or Insufficiency, or other defects in Chancellours, Commissaries, &c. properly cognizable not in the Temporal, but Ecclesiastical Courts.*
20. *The Office of Chancellourship (as to the Right of it) is held to be of Temporal, but (as to the Exercise thereof) of Ecclesiastical cognizance.*
21. *Whether the Offices of Chancellour, Register, &c. in Ecclesiastical Courts, be within the Statute of 5 E. 6.*

Stat. 32 H. 8.
cap. 15.

(1.) **T**HE Chancellour of a Diocese is a Church-Lawyer, or the Bishop's Lawyer, or that person who is commissioned to be aiding and assisting to the Bishop in his Jurisdiction, not confined

fin'd to any place of the Dioceſe, nor limited (as the Biſhops Commiſſaries are) onely to ſome certain cauſes of the Jurisdiction; but every where throughout the whole Dioceſe, ſupplying the Biſhop's abſence, in all matters and Cauſes Eccleſiaſtical within his Dioceſe. By the Statute of 37 H. 8. c. 17. a Doctor of the Civil Law lawfully deputed, may exerciſe all Eccleſiaſtical Jurisdiction, and the Cenſures thereof. By this *Chancellor* the Biſhop within his Dioceſe keeps his Court according to the Eccleſiaſtical Laws, in all matters pertaining to his Jurisdiction, or otherwiſe relating more immediately to the Church or Government of the Clergy. As Biſhops in their Episcopical audience have had in all Ages the cognizance of all matters Eccleſiaſtical, as well Civil as Criminal, within the Jurisdiction of their Dioceſe: ſo they have ever had to that end their *Chancellours*, whom the Law calls *Eccleſieſedici* or *Episcoporum Ecclici*, perſons experienced in the Civil and Canon Laws, to aſſiſt them in matters of Judgment; and thoſe whom we now call the *Biſhops Chancellours*, are the very ſelf ſame perſons in Office, that anciently did exerciſe Eccleſiaſtical Jurisdiction under Biſhops, and were called *Eccleſieſedici*, Papias per Gothofred in *L. omnem, C. de Epife. & Cler. & in S. praterca, ibid.* Dr. Ridl. *View*, par. 2. cap. 2. ſect. 3. Who (foraſmuch as they have with them the Biſhops Authority every where within the Dioceſe for matters of Jurisdiction, and in that the Biſhops and They make but one *Conſistory*) are called the Biſhop's *Vicars General*, but in reſpect of their Authority, which extendeth throughout the whole Dioceſe, as alſo to diſtinguiſh them from the Commiſſaries of Biſhops, whoſe Authority, as it is reſtrained onely to ſome certain place of the Dioceſe, ſo alſo to ſome certain cauſes of the Jurisdiction, limited unto them by the Biſhops; for which reaſon the Law calls them *Officiales Foraneos*, *quasi Officiales aſtricti cuidam foro Dioceſeos tantum*, Dr. Ridl. *ibid.*

(2.) Dr. Ridley in his *View of the Civil and Eccleſiaſtical Law*, ſays, that *Chancellours* of Dioceſes are nigh of as great Antiquity as Biſhops themſelves, and are ſuch neceſſary Officers to Biſhops, that every Biſhop muſt of neceſſity have a *Chancellor*; and that if any Biſhop ſhould ſeem to be ſo complete within himſelf, as not to need a *Chancellor*, yet the Archbiſhop of the Province, in caſe of reſuſal, may put a *Chancellor* on him, in that the Law preſumes the Government of a whole Dioceſe, a matter of more weight, than can be well ſuſtained by one perſon alone; and that although the Nomination of the *Chancellor* is in the Biſhop, yet his Authority is derived from the Law, *Hoſtienſ. Sum. de Offic. Vicar. nu. 2.* For which reaſon the Law underſtands him as an Ordinary, as well as the Biſhop, *Hoſtienſ. ibid.* It is moſt probable, that the multiplicity

plicity and variety of Ecclesiastical Causes introduced the use and Office of *Chancellours* originally; for after that Princes had granted to Ecclesiastical persons their Causes and their Consistories, and circumstances varying these Causes into a more numerous multiplication, than were capable of being defined by like former Presidents; necessity called for new Decisions, and they for such Judges as were experienced in such Laws as were adapted to matters of an Ecclesiastical Cognizance; which would have been too prejudicial an Avocation of Bishops from the exercise of their more Divine Function, had not the Office of the *Chancellour* in determining such matters, been an expedient to prevent the said prejudice or inconvenience.

*Edit. 1603.

Can. 119,

120, 121,

123, 124,

127.

(3.) By the Constitutions and Canons Ecclesiastical^a it is Ordered, That upon the days of the Visitation every Chancellour, Archdeacon, Commissary and Official, as also at the ordinary time when Church-wardens are sworn, shall deliver them such Books of Articles as whereon to ground their Presentments. Also, that they shall not suffer any to be cited into Ecclesiastical Courts by any General process of *Quorum Nomina*; nor the same person to be cited into several Ecclesiastical Courts for one and the same Crime, for which end the *Chancellour* and *Archdeacon* are within one month next after the Bishop's Visitation, mutually to certify each other under their Hands and Seals, the Names and Crimes of all such as were presented in the said Visitation. Nor shall any *Chancellour*, or other Ecclesiastical Judge, suffer any Judicial Act to be sped otherwise than in open Court, or in presence of the Register, or his Deputy, or other person by Law allowed to speed the same; nor shall have (without the Bishop's consent) any more Seals of Office than one. Nor shall any man be admitted a *Chancellour*, or to exercise any Ecclesiastical Jurisdiction, under the Age of 26 years, and learned in the Civil and Ecclesiastical Laws, and is at least a Master of Arts, or Bachelour of Law, and shall first have taken the Oath of Supremacy in the Bishop's presence, or in open Court, and have subscribed the Articles of Religion, and swear that to the utmost of his understanding he will deal uprightly and justly in his Office, without respect, favour or reward.

Edit. 1562.

(4.) *Sutton* Chancellour of the Bishop of *Gloucester* moved for a Prohibition to stay a Suit before the Commissioners Ecclesiastical, for that Articles were there exhibited against him, because he being a Divine, and having a Rectory with Cure of Souls, and never brought up in the Science of the Civil or Canon Laws, or having any Intelligence in them, took upon him the Office of the *Chancellour* of the Bishop of *Gloucester*, whereas there were divers Canons and Ecclesiastical Constitutions, and also directions from the late

late King *James*, and from the King that now is, That none should be admitted to have those Offices of Chancellourship to a Bishop unless he were instructed and learned in the Canon and Civil Laws; because divers Cases triable in the said Court are of weight, and the Judges there ought to have knowledge of the Laws, otherwise they cannot administer Right to the King's Subjects. Upon these Articles Mr. *Sutton* being examined, confessed that he was a Divine, and had a Spiritual Living, and that the Office of the Chancellourship of the Bishop is grantable for life, and that such a Bishop of *Gloucester* had granted to him the Office for his life, which the Dean and Chapter had confirmed, whereby he had a Freehold therein, and ought to enjoy it during his life. And that notwithstanding this Answer they intended to proceed against him, wherefore he prayed to have a Prohibition; but the Court denied it; for if he be a person unskilfull in these Laws, and by Law ought not to enjoy it, they may peradventure examine that; for although a Lay-person, by his Admission and Institution to a Benefice hath a Freehold, yet he may be sued in the Spiritual Court, and deprived for that Cause; but if he hath wrong, he may peradventure by Assize try it; therefore a Prohibition was denied ^b.

(5.) The Consistory Court of each Archbishop, and every Bishop of every Diocese within this Realm, is holden before the Bishop's Chancellour in the Cathedral Church, or before his Commissary in places of his Diocese far remote and distant from the Bishop's Consistory, so as the Chancellour cannot call them to the Consistory with any conveniency or without great travel and vexation; for which reason such Commissary is called *Commissarius Foranensis*. From these Consistories the Appeal is to the Archbishop of either Province respectively.

(6.) By this word [*Consistory*] is commonly understood that place or Ecclesiastical Court of Justice, held by the Bishop's Chancellour or Commissary in his Cathedral Church or other convenient place of his Diocese, for the hearing and determining of matters and causes of Ecclesiastical cognizance, happening within that Diocese. But when this word refers to the Province of *Canterbury*, then the chief and most ancient Consistory is the Archbishop's high Court of *Arches*, as the Court of Appeal from all other Inferiour Consistories within the said Province. The same word sometimes refers to a Synod or Council of Ecclesiastical persons conven'd together, or to a Session or Assembly of Prelates; but most usually to the Spiritual Court for the deciding of matters of Ecclesiastical cognizance. The word Consistory (*Consistorium*) is supposed to be borrowed of the *Italians*, or rather *Lombards*, signifying as much as (*Prætorium*) or *Tribunal*, being a word *utrinque*

^b Hill. 2 Car.
C. B. Sutton's
Case, Cro.
Rep. Vid.
dict. Case in
Litch. Rep.
Vid. Lit. Sect.
133. 136. 648.

24 H. 4. c. 12.

* Vid. Lit. 38.
Vid. Co. Inst.
p. 4. fol. 332.

^a Cowel. Interp. verb. Consistory.
^b Co. Instit. par. 4. cap. 53. fo. 259. & c. 74. fo. 338.
^c Pro Decano & Capitulo Ecclesia Beat. Mariæ de Lincoln.

juris, and frequently used for a Council-house of Ecclesiastical persons, or the place of Justice in the Court Christian^d.

(7.) The Consistories of Archbishops and Bishops are supposed to begin within this Realm in the time of William the Conqueror^e; which seems very conjecturable from that Charter of his, which Sir Ed. Coke in the fourth part of his Institutes, mentions to have found enrolled, 2 R. 2. nu. 5. f. Which Charter, and Record of great Antiquity, asserting not onely the Episcopal Consistories, but also the Ecclesiastical Jurisdiction, it cannot be supposed but that it ought to be recited here in terminis per extensum, viz.

Willielmus gratia Dei Rex Anglorum, Comitibus, Vicecomitibus & omnibus Francigenis, & quibus in Episcopatu Remigii^a terras habentibus, salutem. Sciatis vos omnes, & ceteri mei Fideles qui in Anglia manent, quod Episcopales Leges, qua non bene, nec secundum Sanctorum Canonum Præcepta usque ad mea tempora in Regno Anglorum fuerunt, Communi Concilio & Concilio Archiepiscoporum meorum & ceterorum Episcoporum, & Abbatum, & omnium Principum Regni mei Emendandas judicavi. Propterea Mando, & Regia auctoritate Precipio, ut nullus Episcopus vel Archidiaconus de Legibus Episcopalibus amplius in Hundretto^b Placita teneant, nec causam, qua ad Regimen animarum pertinet, ad Judicium Secularium hominum adducant; sed quicumque secundum Episcopales Leges de quacunque causa vel culpa interpellatus fuerit, ad locum, quem ad hoc Episcopus elegerit, & nominaverit, veniat, ibique de causa sua respondeat, & non secundum Hundretto^c, sed secundum Canones & Episcopales Leges Rectum Deo & Episcopo suo faciat. Si vero aliquis per superbiam elatus ad Justitiam Episcopalem venire non voluerit, vocetur semel, & secundo, & tertio; quod si nec sic ad emendationem venerit, Excommunicetur: & si opus fuerit, ad hoc vindicand^d fortitudo & Justitia Regis vel Vicecomitis adhibeatur: Ille autem qui vocatus ad Justitiam Episcopi venire noluit, pro unaquaque vocatione legem Episcopalem emendabit: hoc etiam Defendo, & mea auctoritate interdico, ne ullus Vicecom. aut prepositus, aut minister Regis, nec aliquis Laicus homo de Legibus qua ad Episcopum pertinent se intromittat: nec aliquis Laicus homo alium hominem sine Justitia Episcopi ad Judicium adducat; Judicium vero in nullo loco portetur nisi in Episcopali Sede, aut in illo loco quem ad hoc Episcopus constituerit.

^a In Terno, ita Co. ubi sup.

^b This is not intended of the Hundred Court, but that in those times the Sheriff did hold his tourne per Hundreda. Ita Co. ubi sup. vid. Mag. Chart. cap. 35. & Expofit. Co. thereon.

(8.) For the Confirmation of this Charter Sir Ed. Coke in the foresaid part of his Institutes refers us to the Register of the Bishop of London. Willielmus Dei gratia Rex Anglorum R. Bainardo, & S. de magna Villa P. de Vabines, ceterisque meis fidelibus de Essex & de Hertfordshire, & de Middlesex, salutem. Sciatis vos omnes, &c.

In which Charter the tenour of the foresaid Charter is recited word by word in *English*. The like Charter he also there says is in the Book of Charters of the Archbishop of *Canterbury*. Whereby it is most evident, that the Bishops Consistories are of great Antiquity, and that they were erected when Causes Ecclesiastical were removed from the *Tourne* (which is a Court of Record holden before the Sheriff) to the Consistory^k. So that this Law, made by the *Conquerour*, seems (as Mr. *Blount* in his *Nomo-Lexicon* on this word well observes) to give the Original of the *Bishops Consistory*, as it now sits with us distinct and divided from the *Hundred or County-Court*, wherewith it seems probable, in the time of the *Saxons*, to have been joyn'd^l.

^k Co. Instit.
4 par. cap. 53.
fo. 260.

(9.) *Lindwood* in the Provincial Constitutions upon this word *Consistorium quoad Episcopos*, puts this difference between *Consistorium* and *Tribunal*: *Tribunal* (says he) *est Locus in quo sedet Ordinarius inferior*; but *Consistorium est Locus in quo sedet princeps ad Judicandum*; *Lindw. de foro Competem. c. excussis. in ver. Consistoria*. Albeit, according to the vulgar acceptation of these words, we refer *Tribunal* to any place of Judicature, but *Consistorium* to that onely which is of Ecclesiastical Jurisdiction.

^l Vid. Seld.
History of
Tithes, p.
413, 414.

(10.) This Chancellour of a Diocese as he is *Oculus Episcopi*, ought to have an eye into all parts of the Diocese, and hath immediately under the *Ordinary* Jurisdiction of all matters Ecclesiastical within the same; not onely for reformation of Manners, and punishment of Enormities of a Spiritual nature by Ecclesiastical Censures; but also in Causes Matrimonial, and Testamentary as to the Probat of Wills, and granting Letters of Administration of the Goods of a person dying Intestate, where there are not *Bona Notabilia*; in which case the Will shall be proved, or Administration granted by the Prerogative of the Archbishop: And where ever there is an Administration duly granted, there the Administrator doth almost in all points represent the person of the Intestate as legally, as any Executor can the person of his Testator Testamentarily. For this Administrator, in construction of the Common Law, is that person to whose trust, care, conduct and management the Goods and Chattels, Real and Personal, of the Intestate are committed by the Ordinary, or such other as under him is duly authorized to grant the same. But under this Notion or Appellation of Administrator, neither the *Civil* nor the *Canon* Law knows any such Officer; onely they take notice of Administrators as Governours of Persons, Places or Things, *Dicret. Can. 23. q. 5. cap. 26. & Extra. Com. cap. 11*. And it is most probable, that the Common Law might (as some conceive) take its light, as to this Officer under this notion as now practicable with us, from

the Constitution of the Emperour Leo, L. 28. *nulli licere, C. de Episc. & Cler.* whereby it is ordained, That the Bishop shall take care to see such Legacies duly performed, as are bequeathed for the Redemption of Captives, in case the Testator appoint not one to execute his Will in that particular. This power given to the Ordinary of making Administrators in case of Intestation, and of authorizing them to act as Executors, is very ancient by the Statute Law ^m. And if any Ordinary, Chancellour, &c. having power by the Act of 21 H. 8. to grant the Administration of the goods of him that dieth intestate, to the Widow or next of Kin, shall take any Reward for the preferring any person before another to the Administration, it is *Bribery* ⁿ.

^m West. 2.
An. 13 Ed. 1.
cap. 19. &
31 Ed. 3. c.
11. & 21 H.
8. cap. 5.
ⁿ Co. Inst.
par. 3. c. 68.
Vid. 2 R. 2.
Rot. Parl.
m. 46.

(11.) A lawfull Administratour may render his own Goods liable to the Intestate's Debts either by a *Devastavit*, or by a False Plea Judicially; and his Executour or Administratour shall not succeed him in the Administration to his Intestate (unless qualified to require Administration of both Intestates) but the Administration of the first Intestate's goods is *de novo* to be committed to his next of Kin, as *de bonis non Adm.* And if a Stranger by any Act make himself Executour *de son sort*, the Creditours and Legataries may not sue him as Administratour, albeit it be an Administration in Fact, but must sue him as Executour in his own wrong; who notwithstanding is not any farther liable, than to the value of the Deceased's Goods, as Assets in his hands. But in case the Ordinary shall, without granting any Letters of Administration, make his Letters *Ad Colligendum*; in that case he makes himself liable to Actions *pro tanto*, as if himself were actually possessed of the Goods of the Deceased. And here note, That Funeral expences, according to the degree and quality of the Deceased, are to be allowed of his Goods before any debt or duty whatsoever, for that is *Opus pium*, or *Charitativum* ^o.

^o Co. Inst.
par. 3. cap. 97.

(12.) And as in these Consistories there is a great variety of Ecclesiastical Causes heard and determined, so also the Officers belonging thereto are many, and of various qualities and degrees; whereof some seem to be *magis principales*, others *minus principales*, but others (in the popular account) as mere *Animalia tantum Rationalia*, by whom they understand *Apparitors*, who in truth are *Summoners*, and whose Character in Law is this, *viz. He is that person, whose employment is to serve such Processes as issue out of the Spiritual or Ecclesiastical Courts, and as a Messenger to cite Offenders and others to make their appearance therein as occasion shall require.* By the Statute of 21 H. 8. c. 5. as also by the 138th Canon of the Ecclesiastical Constitutions, *Apparitors* are called *Summoners* or *Sumners*; by which Canon the Abuses and Grievances pretended

to

to be practised by such *Summoners* or *Apparitors* are sufficiently redressed: For as the multitude of them is thereby abridged and restrained by Decreeing and Ordaining, That no Bishop or Archdeacon, or their Vicars or Officials, or other inferiour Ordinaries, shall depute or have more *Apparitors* to serve their Jurisdictions respectively, than either they or their Predecessours were accustomed to have *Thirty* years before the publishing the said Ecclesiastical Constitutions: So it is likewise provided by the said *Canon*, That the said *Apparitors* shall by themselves faithfully execute their Offices, and not by any colour or pretence whatsoever cause or suffer their Mandates to be executed by any Messengers or Substitutes, unless upon some good cause, to be first allowed and approved by the Ordinary of the place. It is also farther Provided by the said *Canon*, That they shall not take upon them the Office of *Promoters* or *Informers* for the Court, nor shall exact more or greater Fees than are prescribed by the 135th *Canon* of the said Ecclesiastical Constitutions. And in case either the number of *Apparitors* deputed shall exceed the aforesaid Limitation, or any of them offend in any of the Premises, the persons deputing them (if they be Bishops) shall upon Admonition of their Superiour, discharge the persons exceeding the Number so limited as aforesaid: But if they were deputed by inferiour Ordinaries, such Ordinaries shall be suspended from the execution of their Office, untill they have dismissed the supernumerary *Apparitors* by them so deputed; and the parties themselves so deputed shall for ever be removed from the Office of *Apparitors*: And in case being so dismiss'd and removed, they do not desist from the execution of their said Offices, they are by the first said *Canon* to be proceeded against and punished by Ecclesiastical Censures as persons contumacious to the Jurisdictions. And finally, if upon experience the number of the said *Apparitors* be too great in any one Diocese, in the judgment of the Archbishop of *Canterbury* for the time being; in that case he is by the said *Canon* impower'd to abridge them to such a number, as to himself shall seem meet and expedient.

An *Apparitor* came to the Church of a Parson, and said to him, He is to pay *Ten*ths to such a one at such a place, four miles distant from the Church, to whom the Parson did not pay them, and thereupon the Bishop certified, That he refused to pay them according to the Statute of 26 H. 8. It was Resolved, The Demand was not according to that Statute, and the Summons to pay them not according to the Statute, for the Demand ought to have been by one who hath authority to receive them, which the *Summoner* had not; And they held the Demand not good, although the Bishop certified it was duly made. And in the Case.

*Reyner and
Parker's Case:
More's Rep.*

Cafe between the Queen and *Blanch* it was Resolved, That the Certificate of the Bishop, that the Incumbent refused to pay his Tenth, is not Peremptory, but Traversable; and that the Demand of the Tenth must be at the house of the Incumbent, and the Refusal there, *More's Rep.* 1225.

*Pool and God-
frey's Cafe,
More's Rep.*

In an Action upon the Cafe against the Defendant, the Cafe was this; A *Summoner* in the Ecclesiastical Court, having a Citation against the Plaintiff, Returned, That he had Summoned the Plaintiff, whereas in truth he never summoned him; for which the Plaintiff was Excommunicated to his great damage. It was adjudged that the Action did lie.

(13.) By the Premises it is manifest, that the Canon is very strict and exact both in abridging the Number; and redressing the Abuses incident to the Office of *Apparitors*; which Canon in most Circumstances seems to run very parallel with that in the Provincial Constitutions, *Lindw. Provin. Constit. de Censibus & Procur. cap. cum Apparitorum*; the light whereof did probably influence it into that Form wherein we now find it; For by that Decree of the said Provincial Constitutions it is Ordained, That a Bishop shall have *unum Apparitorem Equitatem duntaxat*, where the Gloss well observes, that by this *non prohibetur Episcopo quin plures habeat pediter*; And every Archdeacon one in every Deanry, *non equitatem sed peditem*, where the Bishop might also appoint *Apparitors*, as also in Rural Deanries: *Gloss. ibid. verb. Duntaxat*. And in case more than these were deputed, or they found to offend in their Office, the Penalty was as abovesaid, *Deputantes sint suspensi, donec, &c. & Deputatos ab Officio Apparitorum perpetuo suspendimus ipso facto, Constit. ibid.*

(14.) Action upon the Cafe; For that the Defendant being an *Apparitor* under the Bishop of *Exeter*, maliciously and without colour or cause of suspicion of Incontinency, of his own proper malice, procured the Plaintiff *Ex Officio*, upon pretence of Fame of Incontinency with one *Edith* (whereas there was no such Fame nor just cause of suspicion) to be cited to the Consistory Court of *Exeter*, and there to be at great charges and vexation, until he was cleared by Sentence, which was to his great discredit, and cause of great Expenses and Losses, for which, &c. upon *Not guilty* pleaded, and found for the Plaintiff, it was moved by *Ashley*, Serjeant, in Arrest of Judgment, That in this Cafe an Action lies not: For he did nothing but as an Informer, and by virtue of his Office. But all the Court (*absente Richardson*) held, That the Action well lies: For it is alledged, That he *falso & malitiose* caused him to be cited, upon pretence of Fame where there was no offence committed: And avers, That there was not any such Fame; so

as.

as he hid it maliciously, and of his own head, and caused him to be unjustly vexed, which was to raise gain to himself; whereupon they conceived, That he being found guilty for it, the Action well lies; And therefore Rule was given to enter Judgment for the Plaintiff, unless other cause was shewn. And upon a second motion, *Richardson* Chief Justice being present, Judgment was given for the Plaintiff. The Consistory of the Bishop may in some Cases enjoin Penance: Where Penance is enjoined, there may be Commutation; but there may not be commutation for Penance, where none is enjoined. Commutation for Penance agrees with the Customes used in the Ecclesiastical Law, justified in the Common Law, in the Statute of *Circumspicite agatis* in the time of Ed. 1. and *Articuli Cleri* in the time of Ed. 2. *Vid. Mich. 21 Jac. B. R. Dr. Barker's Case in Camera Stellata, Roll's Rep.*

(15.) *Commissary* [*Commissarius*] is a Title of Ecclesiastical Jurisdiction, adapted to such one as doth exercise the same in such remote places of the Diocese, and at such distance from the Bishops chief Consistory, as that his Chancellour cannot without too great a prejudice conveniently call the Subjects to the same. The duty of such Commissary or *Officiales Foranei*, is to officiate the Bishop's Jurisdiction in the remoter parts of the Diocese, or in such Parishes as are the Bishop's peculiar, and exempt from the Archdeacon's Jurisdiction. The Authority of the Commissaries of Bishops is onely in some certain place of the Diocese, and some certain causes of the Jurisdiction, limited unto them by the Bishops; for which reason the Law calls them *Officiales Foraneos, quasi Officiales astricti eidam foro Diocesano tantum*: *Gloss. in Clem. de Rescript.* And by the Canons and Constitutions Ecclesiastical, no person may be a Commissary or Official under the Age of 26 years, being at least a Master of Arts or Batchelour of Law. Yet in the Argument of *Burys Case* for a Divorce, the 5 *Rep.* 98. there was cited 35 *Eliz. B. R. rot.* 605. That if a Layman be made a Commissary by the Bishop, it is good untill it be undone by sentence; although that the Canon says, That he ought to be a Doctour or a Batchelour of Divinity. But 21 *H. 8.* hath limited, That a Doctour of the Civil Law may be a Commissary.

(16.) Where a Commissary, citing many persons of several Parishes to appear at his Visitation-Court, Excommunicated them for not appearing, a Prohibition was granted, because the Ordinary hath not power to cite any to that Court, but the Church-Wardens and Sides-men, and those he may impanel, and give Articles to them, for to enquire as the Justices of Assize, *Vid. N. B. 41. c.*

(17.) The

Hill. 7 Car. rot. 1147. B. R. Carlion vers. Mill. Cro. Rep.

Can. 127.

Burys Case. Noy Rep.

Vid. Noy Rep. post Case Coke

vers. Wall.

(17.) The Dean of the Deanry of *Wolverhampton* annexed to the Deanry of *Windsor*, being a Peculiar, and having ordinary Jurisdiction, makes a Commissary by his Deed, which is confirmed by the Chapter: The Dean dies. The question was, if that was good to bind his Successour. By *Doderidge*, that such a Jurisdiction is Judicial, and that Grant is but a Commission and Authority, all times remaining in the Ordinary. True it is, That Ecclesiastical Jurisdiction in judicial Acts may be executed by a Substitute; but in Law they are the Acts of them who substitute the other, *Vid.* 11 H. 4. 64. a. 7 E. 4. 14. 20 H. 6. 1. That a Commissary may excommunicate, and prove a Testament: But that shall be made in the name of the Ordinary, 20 E. 3. And a Grant of that by the Bishop is not good, but during his life; and shall not bind the Successour: For the Law hath appointed, that he shall exercise that jurisdiction (*Sede vacante*, &c.) The Grant being void, cannot be made good by the Confirmation of the Chapter. *Coke*, chief Justice; If that should be a good Grant to bind the Successour, then the Successour cannot remove him; And yet the Successour shall answer for the Acts and Offences of the Commissary, which would be too hard.

* The Prebend of *Hatcherly's Case*, Noy Rep.

Whether the Office of a Commissary may be granted to a Lay-person.

(18.) In *Walker's Action upon the Case against Sir John Lambe*, For disturbance of the Plaintiff in exercising of the Officialty of the Archdeaconry of *Leicester*, granted by the Archdeacon of *Leicester*, and of the office of Commissary of the Bishop of *Lincoln*. Upon *Not guilty* pleaded, a special Verdict was found, That there were ancient Offices granted by, &c. and Offices of Judicature always granted to one person for life untill 1609. and in 30 Elizabeth. so granted to Dr. *Chippindale*, and after in 1609. granted to him and one *Ed. Clerk* for their Two lives, no Surrender being actually made by Dr. *Chippindale*. Afterwards, 1614. both Offices were granted, the one by the Archdeacon, the other by the Bishop to Sir *John Lambe*, and to the said *Ed. Clerk*, and these Grants confirmed by the Dean and Chapter; That in An. 1622. Dr. *Chippindale* died, and afterwards the Archdeacon who granted that Office, and the Bishop who granted the Office of Commissary, died; and the Bishop of *Lincoln* who now is, and the now Archdeacon, by several Patents granted these Offices to the Plaintiff, who was at the time of the Grant of the Patent a Lay-person, and Batchelour of the Civil Law onely: And they find the Statute of 37 H. 8. c. 17. That Lay-persons married or unmarried, being Doctors of the Civil Law, may be Commissaries, Officials, Scribes or Registers, and that the Plaintiff exercised these Offices, and the Defendant disturbed him. Upon this the matter being argued at the Bar, was reduced onely to these Two Questions: (1.) Whether the

the Patent to the Plaintiff, being a Lay-person, and not a Doctor of the Law, were good, or restrained by the Statute of 37 H. 8. And as to that point all the Court conceived, The Grant was good, for the Statute doth not restrain any such Grant: And it is but an affirmance of the Common Law, where it was doubted, if a Lay or Married person might have such Offices; and to avoid such Doubts this Statute was made; which explains, That such Grants are good enough; and it is but an affirmative Statute, and there is no restriction therein: And although Doctours of the Law (though Lay-persons, or Married) shall have such Offices, yet this is not any restriction, That none others shall have them but Doctours of the Law, and the Statute mentions as well Registers and Scribes, as Commissaries, and that a Doctour of the Law shall have them; yet in common experience such persons as are merely Lay, and not Doctours, have enjoyed such Offices. And for this very point was a Case in this Court, *Hill. 35 Eliz. Rot. 181.* between *Pratt* and *Stock*, where, upon Demurrer, this Statute was pleaded against the Plaintiff, to whom a Commissaryship was granted, being but a Batchelour of Law; and he having granted Administration, the Grant was adjudged good, and the *Book of Entries*, 484, & 489. was allowed good; wherefore they Resolved the Grant was well enough. And it was also Resolved, That where an Officer for life accepts of another Grant of the same Office to him, and to another, it is not any surrender of the first Grant. The Second point was, Whether the office of the Officialty of the Archdeaconry, and the office of the Commissary of the Bishop, be grantable by the Statutes of 1 *Eliz.* and 13 *Eliz.* because it was pretended, they were not parcel of the Possessions of the Bishoprick or Archdeaconry, so as they could have any profits by them, and then the Statute doth not restrain the Grants of them. But all the Court Resolved, they were within the words and intent of the Statutes; for they be *Hereditaments*, and are pertaining unto them; And that a Grant of these Offices to Two, where they were onely grantable to One for life, and being granted in Reversion, it is a void Grant by the Statutes against the Successours; For the Statutes restrain all Grants of any thing to be avoidable against the Successour, besides Grants of necessity and Leases for three Lives, or 21 Years, where the ancient Rent is reserved: And all other Grants, as well of Offices as of other things, not warranted by the Statutes, are made void as against the Successours, *Vid. Coke 10. fo. 60.* the Bishop of *Salisbury's* Case, *Coke 5. fo. 14.* and a Case betwixt *Vaughan* and *Crompton* 14 *Jac.* at the Assizes before the Justices of the Assize for the Office of the Registership in *Suffolk*, and between *John's* and *Powell* for the Re-

gallies place of *Hertford*, where it was adjudged, That such Offices granted in Reversion were void: Whereupon Rule was given, That Judgment should be enter'd for the Plaintiff, unless other cause were shewn. And afterward being moved again, Judgment was given for the Plaintiff.

* Trin. 7 Car.
rot. 374.
Walker vers.
Sir J. Lamb,
Gra. Rep.

(19.) *Noy*, Attorney, reports the foresaid Case of *Dr. Sutton* in this manner, viz. That he was deprived of the office of Official of *Gloucester* by the Commissioners 3 Jac. appointed to examine the defects of Chancellours, and that he was not read in the Canon or Civil Law. He said, That time out of mind, &c. the Bishops have used in their Dioceses to bestow the Chancellourship, and that *A.* the Bishop of, &c. had made him Chancellour by Deed; and that was confirmed by the Dean and Chapter, by which he had a Frank tenement in that Office, &c. And *Mr. Glanville* moved for a Prohibition, but it was denied by the Court; for it is lawful for the Commissioners to deprive for Insufficiency, that being within their Commission; but in a Suit in the Ecclesiastical Court for the Profits of that Office, supposing the Grant of that by the Predecessour does not bind the Successour; as it was in *Dr. Barker's* Case, there a Prohibition shall be awarded, because the Profits are Temporal. But we in the first Case cannot try the Sufficiency: *Vid.* 8 E. 3. 70. 9 E. 3. 11. So it is if the Ordinary deprive the Master of a Lay-Hospital, for there he is not a Visitor, nor is it visitable by him; but otherwise of a Spiritual Hospital.

Pasch. 3 Car.
B. R. Dr. Sutton's Case, in
Noy's Rep.

(20.) The Bishop of *Landaff* granted the office of his Chancellourship to *Dr. Trevor* and one *Griffin*, to be exercised by them either jointly or severally. *Dr. Trevor* for 350. l. released all his Right in the said Office to *Griffin*, so that *G.* was the sole Officer, and then after died. After this the Bishop grants the said Chancellourship to *R.* (being a Practitioner in the Civil Law) for his life. *Dr. Trevor* surmising, that himself was the sole Officer by Survivorship, made *Dr. Lloyd* his Substitute, to execute the said Office for him, and for that, that he was disturbed by *R.* the said *Dr. Trevor* being Substitute to the Judge of the *Arches*, granted an Inhibition to inhibit the said *R.* from executing the said Office. The Libel contained, That one *R.* hindred and disturbed *Dr. Lloyd*, so that he could not execute the said Office. Against these proceedings in the *Arches* a Prohibition was prayed, and day given to *Dr. Trevor* to shew cause why it should not be granted. They urged, that the Office was Spiritual, for which reason the discussing of the Right thereof, appertaineth to the Ecclesiastical Courts. But all the Judges agreed, that though the Office was Spiritual, as to the Exercising thereof, yet as to the Right thereof it was Temporal, and shall be tried at the Common Law, for the party hath a Freehold there-
in.

in, *vid. 4 & 5 P. & M. Dyer* 152. 9. *Hunt's Case*, for the Registers Office in the Admiralty, and an *Affize* brought for that: And so the Chief Justice said, was adjudged for the Registers Office to the Bishop of *Norwich* in *B. R.* between *Skinner* and *Mingey*, which ought to be tried at the Common Law. And so *Blacke's Case*, as *Warburton* said, in this Court for the Office of Chancellour to the Bishop of *Gloucester*, which was all one with the principal Case. And they said, That the Office of Chancellour is within the Statute of *Ed. 6.* for buying of Offices, &c. And so in the manner of Tithings, the Prescription is Temporal, for which cause it shall be tried at Common Law. And Prohibition was granted according to the first Rule. So that if a Bishop grant the Office of Chancellourship to *A.* and *B.* and after *A.* release to *B.* and after *B.* die, and after the Bishop grant it to *R.* against whom *A.* sues in the Ecclesiastical Court, supposing his Release to be void, a Prohibition will lie, for that the Office is Temporal as to the Right of it, though the Office be exercised about Spiritual matters. But if a Chancellour be sued in the Ecclesiastical Court to be deprived for Insufficiency, as not having Knowledge of the Canon Law, no Prohibition lies, for that they are there the proper Judges of his ability, and not the Judges of the Common Law.

Hill. 16. 10.
8 Jac. B. R.
Robtson
vers. *Trevor*.
Brownl. Rep.
pa. 2.

Pasch. 3 Car.
B. R. Chan-
lour of *Glou-*
cester's Case.
Resolved per
Curiam and
Prohibition
denied.

Hill. 8 Jac.
Dr. *Trevor's*
Case, *Cole*
lib. 12.

Co. *ibid.*

(21.) In *Dr. Trevor's Case*, who was Chancellour of a Bishop in *Wales*, it was Resolved, That the Offices of Chancellour and Register, &c. in Ecclesiastical Courts, are within the Statute of *Ed. 6.* cap. 16. which Act being made for avoiding Corruption of Officers, &c. and advancement of Worthy persons, shall be expounded most beneficially to suppress Corruption. And because it allows Ecclesiastical Courts to proceed in Blasphemy, Heresy, Schism, &c. Legality of Matrimonies, Probate of Wills, &c. And that from these proceedings depends not onely the Salvation of Souls, but also the legitimization of Issues, &c. and other things of great consequence; It is more reason that such Officers shall be within the Statute, than Officers which concern Temporal matters; The Temporal Judge committing the convict onely to the Gaoler, but the Spiritual Judge by Excommunication, *Diabolus*: And there is a *Proviso* in the Statute for them. And it was Resolved, That such Offices were within the *Purview* of the said Statute.

A a 2 G H A P.

C H A P. XI.

Of Courts Ecclesiastical, and their Jurisdiction.

1. *The Antiquity of the Ecclesiastical Laws of England; and what the Chief Ecclesiastical Courts are in general, anciently called Halimots; The Original of the Pope's Usurpation in England.*
2. *The Court of Convocation, and Constitutions of Clarendon.*
3. *The High Court of Arches, why so called; the highest Consistory; the Jurisdiction thereof.*
4. *The Judge of this Court, whence called Dean of the Arches.*
5. *The great Antiquity of this Court; the number of Advocates and Proctors thereof anciently limited; their decent order in Court.*
6. *The Prerogative Court of Canterbury.*
7. *The Court of Audience, to whom it belonged, where kept, and what matters it took cognizance of.*
8. *The Court of Faculties, why so called, what things properly belong to this Court; As Dispensations, Licenses, &c. with the original thereof in England.*
9. *What the nature of a Dispensation is, and who qualified to grant it.*
10. *A Dean made Bishop, the King may dispence with him to hold the Deanry with the Bishoprick by way of Commendam.*
11. *Whether a Prohibition lies to the Ecclesiastical Courts, in case they do not allow of Proof by one Witness.*
12. *Divers Cases at the Common Law relating to Prohibitions to the Ecclesiastical Courts.*
13. *The Court of Delegates.*
14. *The High Commission Court; what the Power thereof was.*
15. *The Court of Review, or Ad Revidendum.*
16. *The Court of Peculiars.*
17. *In what Cases the Ecclesiastical Court shall have Jurisdiction of matters subsequent, having Jurisdiction of the original Suit.*
18. *In what Case the party, having allowed of the Jurisdiction, comes too late to have a Prohibition.*
19. *The difference between a Suit Ad instantiam partis, and that ex Officio Judicis, in reference to a General Pardon.*
20. *Whether a Clerk may strike his Servant, or another in that case the Clerk, and be blameless?*
21. *What manner of Avoidance shall be tried at the Common Law, and what in the Ecclesiastical Court.*
22. *In what Case a special Prohibition was awarded in a Suit of Tithes after a Definitive Sentence.*

23. A Prohibition to the Ecclesiastical Court in a Suit grounded on a Custom against Law.
24. Prohibition awarded to the Ecclesiastical Court, upon refusal there to give a Copy of the Libel.
25. Where the Ecclesiastical Court hath cognizance of the Principal, they have also of the Accessory, though the Accessory of matters Temporal.
26. A Prohibition denied, upon a Suggestion, That the Ecclesiastical Court would not admit of proof by one Witness.
27. In what case the Ecclesiastical Court shall have the cognizance, albeit the bounds of a Village in a Parish come in question.
28. How the practice hath been touching Prohibitions, where the Subject matter in question hath been of a mixt nature in reference to Jurisdictions.
29. Certain Reasons for denial of Prohibitions to the Ecclesiastical Court, in some cases, where they might lie.
30. Bounds of Parishes, in reference to the Tithes thereof, whether Triable by the Law of the Land, or by the Law of the Church.
31. Where the Question is more touching the Right of Tithes, than the bounds of the Parish, the Ecclesiastical Court hath had the cognizance.
32. The Ecclesiastical Court hath cognizance of Administrators Accounts, and no Prohibition lies.
33. Modus Decimandi sued for by a Parson in the Ecclesiastical Court, no Prohibition; Nor if he there sues for the Tithes of things not Tithable.
34. In what Cases a Custom, as also a Rent, may be sued for in the Ecclesiastical Court.
35. If Question be touching the Grant of a Register's Office in a Bishop's Court, or touching the Tenth after severance from the Nine parts; In what Court, whether Temporal or Ecclesiastical, it shall be tried.
36. A Woman exercising the profession of a Midwife without License, is therefore sued in the Ecclesiastical Court; whether a Prohibition lies in that case.
37. The Bounds of a Parish, also whether such a Church be Parochial, or onely a Chapel of Ease; In what Court this is to be tried.
38. A Prohibition granted; upon the disallowance of an Executor's Plea, of having Assets onely to pay debts, in opposition to a Legacy sued for in the Ecclesiastical Court.
39. A Prohibition awarded upon a Suit in the Ecclesiastical Court for an account of the Profits of a Benefice; Otherwise, in case the Profits were taken during the time of a Sequestration.

40. A Prohibition granted to a Parson to stay proceedings in his *Adv Suis*, and commenced by himself.

41. *Pensions* are payable only in the Ecclesiastical Courts.

42. The right of Tithes coming in question between the Parson and the Vicar, is a *Suis* properly belonging to the Ecclesiastical Courts.

43. Whether, and how far, and in what manner the Ecclesiastical Courts may take cognizance of a *Modus Decimandi*, at large debated.

44. When and how the Canon Law was introduced into this Realm.

(1.) **B**Efore the time of King William the Conqueror all matters, as well Spiritual as Temporal, were determined in the *Hundred Courts*, where was wont to sit one Bishop and one Temporal Judge called *Aldermannus*; the one for matters of Spiritual, the other of Temporal cognizance: But that was altered by King William (and it seems by Parliament, for it was by the assent of the Bishops, Abbats, and all the chief persons of the Realm) for he Ordained, That the Bishop or Archdeacon should not hold Plea of the Episcopal Laws, & que ad regimen animarum pertinet, in the *Hundred*; but by themselves, and there administer Justice, not according to the Law of the *Hundred*, but according to the Episcopal Laws and Canons, as appears by King William's Charter, *Irrot. 2 R. 2. pro Decano & Capitulo Eccles. Lincolne, Jan. Angl. 26, 77*. The principal Courts Ecclesiastical (whereof some are now out of use) were, and are the *Convocation Court*, the *High Commission Court*, the high Court of *Archies*, the *Provisory Court* of *Canterbury*, the Court of *Delegates*, the Court of *Audience*, the Court of *Peculiars*, the Court of *Faculties*, besides the Bishops *Consistories*, the Archdeacons Courts, and the like, anciently called *Halimots*, or Holy Courts. And the Saxon Kings, long before William the Conqueror, made several Laws for the Government of the Church: Among others St. Edward begins his Laws with this Proclamation, that it is his princely charge, *Ut Populum Domini, & super omnia sanctam Ecclesiam, regat & gubernet*. And King Edgar, in his Oration to his English Clergy, *Ego, (saith he) Constantini, vos Petri gladium habetis: jungamus dexteras, & gladium gladio copulemus, ut ejiciantur extra castra Leprosi, & purgetur Sanctuarium Domini*. But upon the Conquest made by the Normans the Pope took the opportunity to usurp upon the Liberties of the Crown of England; for the Conqueror came in with the Pope's Banner, and under it won the Battel: Whereupon the Pope sent two Legates into England, with whom the Conqueror called a Synod, deposed *Stigand* Archbishop of *Canterbury*, because he had not purchased his Pall in the Court of *Rome*, and displaced many Bishops and Abbats to make

Roll's Abridg.
verb. Prero-
gative, lit. L.

In the Case of
Præmunire,
Davis Rep.

room

room for his Normans. Among the rest the King having earnestly moved *Willan* Bishop of Worcester, being then very aged, to give up his Staff, was answered by him, That he would give up his Staff onely to him of whom he first received the same: And so the old Bishop went to St. Edward's Tomb, and there offered up his Staff and Ring, with these words, viz. Of thee, O holy Edward, I received my Staff and my Ring, and to thee I do now surrender the same again. Which proves, that before the Norman Conquest the Kings of England invested their Bishops per Annulum & Bacculum. By this admission of the Pope's Legates, was the first step, or entry, made into his Usurped Jurisdiction in England; yet no Decrees passed, or were put in Execution touching matters Ecclesiastical without the King's Royal Assent; nor would he submit himself in point of Fealty to the Pope, as appears by his Epistle to Gregory the Seventh, Vid. Da. Rep. Case of Præmunire, fo. 89. yet in his next Successour's time, in the time of William Rufus, the Pope, by *Anselme* Archbishop of Canterbury, attempted to draw Appeals to Rome, but prevailed not. Upon this occasion it was, that the King told *Anselme*, That none of his Bishops ought to be subject to the Pope, but that the Pope himself ought to be subject to the Emperour, and that the King of England had the same absolute Liberties in his Dominions as the Emperour had in the Empire. Yet in the time of the next King *H. I.* the Pope usurped the Patronage and Donation of Bishopricks, and all other Benefices Ecclesiastical: at which time *Anselme* told the King, That the Patronage and Investiture of Bishopricks was not his Right, because Pope Urban had lately made a Decree, That no Lay-person should give any Ecclesiastical Benefice. And after this in a Synod held at London, An. 1107. a Decree was made, *Cui annuit Rex Henricus*, (says *Matth. Paris.*) that from thenceforth, *Nunquam per donationem Baculi Pastoralis vel Annuli quisquam de Episcopatu vel Abbatia per Regem, vel quamlibet Laicam manum, investiretur in Anglia.* Hereupon the Pope granted, That the Archbishop of Canterbury, for the time being should be for ever *Legatus Natus*: And *Anselme*, for the honour of his See, obtained, That the Archbishop of Canterbury should in all General Councils sit at the Pope's foot, *tanquam alterius Orbis Papa.* Yet after *Anselme's* death, this same King gave the Archbishoprick of Canterbury to *Rodolph* Bishop of London (says *Matth. Paris.*) *Et illum per Annulum & Pastoralem Baculum investivit*, as before he had invested *William Gifford* in the Bishoprick of Winchester, *contra novi Concilii Statuta*, as the same Author reporteth; And this, because succeeding Popes had broken Pope Urban's promise, Touching the not sending of Legates into England, unless the King should require it. And in the time of the next succeeding King, *Stephen*, the Pope gained Appeals to

Hist. Forman-
lensis M. S.
in Archiv.
Rob. Cotton.
Ep. 400.

the

the Court of *Rome*; For in a Synod at *London* conven'd by *Henry* Bishop of *Winchester*, the Pope's Legate, it was decreed, That Appeals should be made from Provincial Councils to the Pope. Before which time, *Appellationes in usu non erant* (saith a Monk of that time) *donec Henricus Winton. Episcopus malo suo, dum Legatum esset, crudeliter intravit*. Thus did the Pope usurp three main points of Jurisdiction upon three several Kings after the Conquest (for of King *William Rufus* he could win nothing,) viz. upon the Conquerour, the sending of Legats or Commissioners to hear and determine Ecclesiastical Causes: Upon *Hen. 1.* the Donation and Inveitures of Bishopricks and other Benefices: and upon King *Stephen*, the Appeals to the Court of *Rome*. And in the time of King *Hen. 2.* the Pope claimed exemption of Clerks from the Secular Power.

Convocation a
Convocando
by the King's
Writ.

(2.) The high Court of *Convocation* is called the Convocation of the Clergy, and is the highest Court Ecclesiastical, where the whole Clergy of both Provinces are either present in person, or by their Representatives. They commonly meet and sit in Parliament-time; consisting of two parts, viz. the Upper-house, where the Archbishops and Bishops do sit; and the Lower-house, where the Inferiour Clergy do sit. This Court hath the Legislative power of making Ecclesiastical Laws, is commonly called a National Synod, conven'd by the King's Writ, directed to the Archbishop of each Province, for summoning all Bishops, Deans, Archdeacons, Cathedral and Collegiate Churches, assigning them the time and place in the said Writ; but one Proctor sent for each Cathedral and Collegiate Church, and two for the Body of the inferiour Clergy of each Diocese may suffice. The higher house of Convocation, or the House of Lords Spiritual, for the Province of *Canterbury* consists of 22 Bishops, whereof the Archbishop is President; the Lower house, or House of Commons Spiritual, consisting of all the Deans, Archdeacons, one Proctor for every Chapter, and two for the Clergy of each Diocese, in all 166 persons, viz. 22 Deans, 24 Prebendaries, 54 Archdeacons, and 44 Clerks representing the Diocesan Clergy. Both Houses debate and transact onely such matters as his Majesty by Commission alloweth, concerning Religion and the Church. All the Members of both Houses of Convocation have the same privileges for themselves and Menial Servants, as the Members of Parliament have. The Archbishop of *York* at the same time, and in the like manner, holds a Convocation of all his Province at *York*, constantly corresponding, debating and concluding the same matters with the Provincial Synod of *Canterbury*. The Antiquity of this Court of Convocation is very great, for (according to *Beda*)

St. Au.

§ H. 6. c. 1.

St. *Augustine*, An. 686. assembled in Council the Britain Bishops, and held a great Synod. The Clergy was never assembled or called together at a Convocation by other Authority, than by the Kings Writ, *Vid. Parl. 18 E. 3. nu. 1. Inter Leges Inq. An. Dom. Coke, par. 4. 727.* A Convocation of the Clergy called, *Magna servorum Dei frequentia*. The jurisdiction of the Convocation is onely touching matters merely Spiritual and Ecclesiastical wherein they proceed *juxta Legem Divinam & Canones Sancta Ecclesie*. The Lord Coke *Ibid.* cites some ancient Records to prove, that the Court of Convocation did not meddle with any thing concerning the King's Temporal Laws of the Land, and thence infers, That the *Statute of 25 H. 8. cap. 19.* (whereby it is provided, *That no Canons, Constitution or Ordinance should be made or put in execution within this Realm by Authority of the Convocation of the Clergy, which were contrariant or repugnant to the King's Prerogative Royal, or the Customs, Laws and Statutes of this Realm*) is but declaratory of the old Common Law. And by the said Act, the Court of Convocation, as to the making of new Canons, is to have the King's License, as also his Royal Assent for the putting the same in execution. But towards the end of that Act there is an express *Proviso*, that such Canons as were made before that Act, which be not contrariant and repugnant to the King's Prerogative, the Laws, Statutes or Customs of the Realm, should be still used and executed, as they were before the making of that Act. And if any Cause shall depend in contention in any Ecclesiastical Court, which shall or may touch the King, his Heirs or Successours, the party grieved shall or may appeal to the Upper-house of Convocation within fifteen days after Sentence given. Remarkable are the Constitutions of *Claringdon* in the time of King *H. 2.* occasioned by the Pope's claiming Exemption of Clerks from the Secular power, so contended for by *Thomas Becket*, then Archbishop of *Canterbury*, against the King, as occasioned a convening a Common Council, as well of the Bishops as of the Nobility, at *Claringdon* in the time of *H. 1.* wherein they revived and re-established the Ancient Laws and Customes of the Kingdom for the Government of the Clergy, and ordering of Causes Ecclesiastical. The principal Heads or Articles whereof were these, *viz.* (1.) That no Bishop or Clerk should depart the Realm without the King's License; and that such as obtained License, should give Sureties, That they should not procure any damage to the King or Realm during their absence in Foreign parts. (2.) That all Bishopricks and Abbies being void should remain in the King's hands as his own Demesns, untill he had chosen and appointed a Prelate thereunto; and that every such Prelate should do his Homage to the King before he be admitted to

*1 Eliz. cap. 1.
Co. ubi supr.*

*In the Case of
a Præmunire,
Davis Rep.
fo. 91.*

the place. (3.) That Appeals should be made in Causes Ecclesiastical in this manner, viz. From the Archdeacon to the Ordinary, from the Ordinary to the Metropolitan, from him to the King, and no farther. (4.) That *Peter-pence* should be paid no more to the Pope, but to the King. (5.) That if any Clerk should commit Felony, he should be hanged; if Treason, he should be drawn and quartered. (6.) That it should be adjudged High Treason to bring in Bulls of *Excommunication*, whereby the Realm should be cursed. (7.) That no Decree should be brought from the Pope to be executed in England, upon pain of Imprisonment and Confiscation of Goods.

So called in
Stat. 25 H. 8.
c. 19.

(3.) *Archies*, or *alma Curia de Arcubus*, so called of *Bow-Church* in London, by reason of the Steeple or *Clocher* thereof raised at the top with Stone Pillars in fashion like a Bow bent *Arch-wise*, in which Church this Court was ever wont to be held, being the chief and most ancient Court and Consistory of the Jurisdiction of the Archbishop of *Canterbury*; which Parish of *Bow* together with twelve others in London, whereof *Bow* is the chief, are within the *Peculiar* Jurisdiction of the said Archbishop in Spiritual Causes, and exempted out of the Bishop of London's Jurisdiction. The Judge of this Court of *Archies* is styled the *Dean of the Archies*, or the *Official of the Archies-Court*, unto whose Deanry or Officialty to the Archbishop of *Canterbury*, in all matters and causes Spiritual, is annexed the *Peculiar* Jurisdiction of the thirteen Parishes, as aforesaid; having also all Ordinary Jurisdiction in Spiritual causes of the first instance with power of appeal, as the superiour Ecclesiastical Consistory, through the whole Province of *Canterbury*; yet the Lord Coke says^b, his power to call any person for any Cause out of any part of his Province within the Diocese of any other Bishop (except it be upon Appeal) is restrained by the Stat. of 23 H. 8. c. 9. Yet his Jurisdiction is ordinary, and extends it self through the whole Province of *Canterbury*, insomuch that upon any Appeal made to him from any Diocese within the said Province, he may forthwith, without farther examination (at that time) of the Cause, issue forth his Citation to be served on the Appallee, with his Inhibition to the Judge *à quo*.

Mich. 6 Jac.
C. B. *Porter*
and *Roche-*
ster's Case,
Co. lib. 13.
& ult.

In Mich. 6 Jac. C. B. there was a Case between *Porter* and *Roche-ster*; The Case was this: *Lewis* and *Roche-ster*, who dwelt in *Essex*, in the Diocese of London, were sued for subtraction of Tithes growing in B. in the said County of *Essex*, by *Porter*, in the Court of *Archies* of the Archbishop of *Canterbury* in London: where the Archbishop hath a peculiar Jurisdiction of thirteen Parishes, called a *Deanry*, exempt from the Authority of the Bishop of London, whereof the Parish of *St. Mary de Arcubus* is the chief. And a great
Question

Question was moved, Whether in the said Court of *Arches* holden in *London*, he might cite any dwelling in *Essex*, for subtraction of Tithes growing in *Essex*? or whether he be prohibited by the Statute of 23 H. 8. c. 9? Which after debate at Bar by Council, and also by Dr. *Ferrard*, Dr. *Jamies*, and others in open Court, and lastly by all the Justices of the *Common Pleas*: A Prohibition was granted to the high Court of *Arches*. And, in this Case, divers points were resolved by the Court; (1.) That all Acts of Parliament are parcel of the Laws of *England*, and therefore shall be expounded by the Judges of the Laws of *England*, and not by the *Civilians* and *Canonists*, although the Acts concern Ecclesiastical jurisdiction. (2.) Resolved by *Coke*, chief Justice, *Wharburton*, *Daniel* and *Foster*, Justices, That the Archbishop of *Canterbury* is restrained by the 23 H. 8. cap. 9. to cite any one out of his own Diocese: For *Diocesis dicitur distinctio, &c. quæ divisa vel diversa est ab Ecclesia alterius Episcopatus, & Commissa gubernatio unius, &c.* And is derived à *Di*, *Duo*, & *Electio*, quia separat duas Jurisdictiones: And because the Archbishop of *Canterbury* hath a peculiar jurisdiction in *London*; for this cause it is fitly said in the Title, Preamble and Body of the Act, that when the Archbishop sitting in his Exempt peculiar in *London*, cites one dwelling in *Essex*, he cites him out of the Bishop of *London's* Diocese; Therefore, out of the Diocese. And in the clause of the penalty of 10 l. it is said, *Out of the Diocese, &c. where the party dwelleth*; which agrees with the signification of *Diocese* before. 2. The Body of the Act is, *No person shall be henceforth cited before any Ordinary, &c. out of the Diocese or peculiar Jurisdiction, where the person shall be dwelling*; and if so, then à *Fortiori*, the Court of *Arches*, which sits in a Peculiar, may not cite others out of another Diocese. And the words [*out of the Diocese*] are meant of the Diocese or Jurisdiction of the Ordinary where he dwelleth. And from the Preamble of the Act the Lord *Coke* observes and infers, That the intention of the Act was to reduce the Archbishop to his proper Diocese, unless in these five Cases, viz. (1.) For any Spiritual offence or cause committed, or omitted, contrary to Right and Duty by the Bishop, &c. which word [*omitted*] proves there ought to be a default in the Ordinary. (2.) Except it be in Case of Appeal, and other lawfull cause, where the party shall find himself grieved by the Ordinary, after the matter there first begun; Therefore, it ought to be first begun before the Ordinary. (3.) In case the Bishop or Ordinary, &c. dare not, or will not Convent the party to be sued before him. (4.) In case the Bishop or Judge of the place, within whose jurisdiction, or before whom the Suit by this Act should be begun and prosecuted, be party, directly or indirectly, to the matter or

cause of the same Suit. (5.) In case any Bishop or other inferior Judge under him, &c. make Request to the Archbishop, Bishop, or other inferior Ordinary or Judge; and that to be done in Cases onely, where the Law Civil or Common doth affirm, &c. The Lord Coke takes notice also of Two *Provisoes* in that Act; which do likewise explain it, viz. That it shall be lawfull for every Archbishop, to cite any person inhabiting in any Bishop's Diocese in his Province for matter of *Heresie*: By which (*says he*) it appears, That for all Causes not excepted, he is prohibited by the Act. (2.) There is a *Saving* for the Archbishop, calling any person out of the Diocese where he shall be dwelling, to the probat of any Testament: Which *Proviso* should be vain, if notwithstanding that Act he should have concurrent jurisdiction with every Ordinary throughout his whole Province: Wherefore it was concluded, That the Archbishop out of his Diocese, unless in the Cases excepted, is prohibited by the 23 H. 8. c. 9. to cite any man out of any other Diocese: which Act is but a Law declaratory of the Ancient Canons, and a true Exposition thereof, as appears by the Canon, *Cap. Romana in Sext. de Appellat. & c. de Competenti. in Sext.* And (as the Lord Coke observes) the Act is so expounded by all the Clergy of England, at a Convocation at London, An. 1 Jac. 1603. Can. 94. who gives us farther to understand in this Case between Porter and Rochester, That the Archbishop of this Realm, before that Act, had power *Legantine* from the Pope; By which they had Authority, not onely over all, but concurrent Authority with every Ordinary, &c. not as Archbishop of Canterbury, &c. but by his Power and Authority *Legantine*. Et tria sunt genera *Legatorum*, (1.) *Quidam de Latere Dom. Pape mittuntur*, &c. (2.) *Dati vi, qui simpliciter in Legatione mittuntur*, &c. (3.) *Nati seu Nativi, qui suarum Ecclesiarum pretextu Legatione funguntur*, & sunt Quatuor, viz. *Archiepiscopus Cantuariensis, Eboracensis, Remanensis, & Pisanus*: Which Authority *Legantine* is now taken away and utterly abolished.

Case Porter
and Roche-
ster, Co. ubi
supr.

* Cowel. In-
terpr. verb.
Arches.

* Temp.
Ed. 1. An.
1295.

(4.) It is supposed, that the Judge of this Court was originally styled the *Dean of the Arches*, by reason of his substitution to the Archbishop's Official, when he was employed abroad in Foreign Embassies, whereby both these names or styles became at last in common understanding, as it were, *Synonymous* c. For the Official of this Court, and the *Dean of the Arches* by such Substitution had both the same juridical Authority, though with distinct styles in several persons, as appears by that which comes next to the Preface to the ancient Statutes of that Court, ordained by Robert Winchelsey Archbishop of Canterbury^d, in the Stat. touching the Form of the Judges Oath, where the words are, *tam Offi-*
cialis

cialis dicta Curia, quam Decanus de Arcubus, suus Commissarius Generalis, &c. For he that was the Archbishop's Official in this Court was heretofore obliged to constitute the *Dean of the Arches* as his Commissary General in his absence; as also appears by another of those Statutes or Constitutions of that Court, ordained by *John Whigfist*, Archbishop of *Canterbury*^c, the Title of which Statute is, *De Decano Ecclesie Beate Mariae de Arcubus Lond.* wherein we find, viz. *Statuimus quod Officialis dictae Curiae teneatur Decanum Ecclesiae suum constituere in ipsius absentia Commissarium.* Also by the Statutes and Constitutions of this Court made by *Matthew Parker* Archbishop of *Canterbury*^f, it is expressly Ordained, That neither the *Dean* or *Official* of the Court of *Arches*, nor the *Auditor* of matters and causes in the Court of *Audience* of *Cant.* nor the Judge of the *Prerogative* Court, shall exercise the Function or Profession of an *Advocate* in any Court belonging to the jurisdiction of the said Archbishop on pain of Excommunication and Suspension^g. In this Court of *Arches* the *Proctors* thereof do wear such Hoods as Bachelours of Arts use to wear in the *Universities*; which Habit or Formality was first enjoined by *Henry Chicheley* Archbishop of *Canterbury*, in the year 1435.^h The Style of this Court is, *Alma Curia Cant. de Arcubus Lond.* And the Appeal from it doth lie to the King in *Chancery*ⁱ.

(5.) This Court of the *Arches* anciently holden in *Bow-Church* of *London*, is of very great antiquity; the Lord *Coke* in the fore-cited place lets us to understand, that he meets with it in a very ancient Record of a Prohibition^k, *In Curia Christianitatis coram Decano de Arcubus Lond.* The Statutes and Ordinances of which Court are very ancient, and to which those ordained by *Robert Winchelsey* Archbishop of *Canterbury*, above 380 years since, do refer: *Robertus Winchelsey Archiepiscopus Cantuariensis descripsit Iudicibus, Advocatis, Procuratoribus, aliisque ministris Almae suae Curiae de Arcubus jura quadam & Statuta, quae ipse in Templo Arcuato sedens pro Tribunalis legit atque obligavit.* Quinto Idus Novemb. Anno 1295. *William de Sardinia* being then his Official, and *Henry de Nassington* Dean of the *Arches*, the said Official's Commissary General; By which Statutes it was ordained, That the *Advocates* belonging to the said Consistory, should not exceed the number of *Sixteen*; nor the *Proctors* above the number of *Ten*; nor should any of them without the special License of the President of that Consistory absent themselves thence, by any attendance on any other Consistory, at such times wherein Causes were to be heard in the *Arches*^l; And for the dispatch of the Causes of poor and indigent persons, the Judge may by the said Statutes assign them *Advocates* and *Proctors* to prosecute for them *Gratis & Charitative*, and Statuta.

An. 3 Eliz.
1583.

Edir. Lamb.
6 Maii
An. 573. &
Consecra. 14.

Vid. dict.
Stat. M. S.

Antiq. Brit.
6 H. 6. An.
1435.

25 H. 8. 19.

Hill. 7 E. 1.
coram Rege.

Rot. 8. Paich.
12 E. 1. in
Banco. Essex.

Guliel. de
Mortuo mari
Clericus, &c.

Vid. Dyer.
7 Eliz. 241.

Ant. Brit.
fo. 201.

M. S. Stat.
Cur. de Ar-
cub. §. de nu-
mero Advoca-
torum & in fi-
nal. Conclusi.

and that nothing be paid for the Process, Acts of Court, Examinations, Sentence, or other Court-fees in such Cases. In which Court the senior Advocates by the same Statutes are to take their places opposite to the Judge, the others on each side of him, higher to, or remoter from him according to their Seniority; the like Order in Court to be observed also by the Proctors. And such was the Devotion of those days in that Consistory, That in order to the imploring of the Divine assistance on their proceedings in Judgment, it was farther ordained, That Divine Service should be celebrated in *Bow Church* immediately before the first, and after the last Session of every Term, the Judge, Advocates, Proctors, and all other Officers of the Court to be present thereat.

(6.) The *Prerogative Court* of the Archbishop of *Canterbury* is that Court wherein all Testaments are proved, and Administrations granted of the Goods and Chattels of such persons, as dying within his Province, had at the time of their death *Bona Notabilia* in some other Diocese, than that wherein they died; which *Bona Notabilia* regularly must amount to the value of Five pounds, save in the Diocese of *London*, where it is Ten pounds by Composition. The Probat of every Bishop's Testament, and the granting of the Administration of his Goods and Chattels, albeit he hath not Goods but within his own Jurisdiction; doth belong to the Archbishop. The like Court hath the Archbishop of *York*. From this Court lies the Appeal to the King in Chancery. If one make two Executours, one of *seventeen* years of Age, and the other under, Administration during the Minority is void, because he of *seventeen* years old may execute the Will, if Administration during the Minority in such case be granted; and if the Administratour brings his Action, the Executor may well release the Debt. One was cited to appear in the *Prerogative Court* of *Canterbury*, which lived out of the Diocese of *Canterbury*, and upon that he prayed Prohibition upon the Statute of 23 H. 8. c. 9. which willeth, that none shall be cited to appear out of his Diocese, without assent of the Bishop, and Prohibition was granted: And yet it was said, that in the time of H. 8. and Queen *Mary* that the Archbishop of *Canterbury* had used to cite any man dwelling out of his Diocese, and within any Diocese within his Province, to appear before him in the *Prerogative Court*, and this without the assent of the Ordinary of his Diocese: But it was resolved by the Court, that this was by force of the power *Legantine* of the Archbishop, that (as *Lindwood* saith) ought to be expressed in the Prohibition, for the Archbishop of *Canterbury*, *Tork*, *Pisa* and *Reymes*, were *Legati nati*, and others but *Legati à latere*. The Lord Coke, in his Institutes,

Dict. Stat.
S. Item Pro-
curatores.
Vid. Provinc.
Const. Lindw.
De Offic. Jud.
Ord. cap. Stra-
tuimus. gloss.
verb. Ad
Pauperes.

Co. Inst. par.
4. cap. 74.

Vigor and
Gascoine's Case
Brownl. Rep.
par. 1. Cases
in Law, &c.

Stat. 23 H. 8.
cap. 9.

Trin. 8 Jac.
Brownl. p. 2.

tutes, par. 3. cap. 69. gives us the Resolutions upon the Statute of 21 H. 8. cap. 5. That if a man makes his Testament in paper, and dieth possessed of Goods and Chattels above the value of 40 *l.* and the Executour causeth the Testament to be transcribed in parchment, and bringeth both to the Ordinary, &c. to be proved; It is at the Election of the Ordinary, whether he will put the Seal and Probat to the original in Paper, or the transcript in Parchment; but whether he put them to the one or to the other, there can be taken of the Executour, &c. in the whole but 3 *s.* and not above; viz. 2 *s.* 6 *d.* to the Ordinary, &c. and his Ministers, and 2 *s.* 6 *d.* to the Scribe for Registring the same: or else the said Scribe to be at his liberty, to refuse the said 2 *s.* 6 *d.* and to have for writing every ten Lines of the same Testament, whereof every Line to contain ten inches, one penny. If the Executour desire that the Testament in Paper may be transcribed in Parchment, he must agree with the party for the Transcribing; but the Ordinary, &c. can take nothing for that, nor for the Examination of the Transcript with the Original, but onely 2 *s.* 6. for the whole duty belonging to him. Where the Goods of the deceased do not exceed five pounds, the Ordinary, &c. shall take nothing, and the Scribe to have onely for writing of the Probat six pence, so the said Testament be exhibited in writing, with Wax thereunto affixed ready to be sealed. Where the Goods of the deceased do amount to above the value of five pounds, and do not exceed the sum of forty pounds, there shall be taken for the whole but 3 *s.* 6 *d.* whereof the Ordinary, &c. 2 *s.* 6 *d.* and 12 *d.* to the Scribe for registring the same. Where by custome less hath been taken in any of the Cases aforesaid, there less is to be taken. And where any person requires a Copy or Copies of the Testament so proved, or inventory so made, the Ordinary, &c. shall take for the Search, and making of the Copy of the Testament or Inventory (if the Goods exceed not five pounds) six pence; and (if the Goods exceed five pounds, and exceed not forty pounds) twelve pence. And if the Goods exceed forty pounds, then two shillings six pence, or to take for every ten Lines thereof of the proportion before rehearsed, a peny. And when the party dies intestate, the Ordinary may dispose somewhat in pious uses, notwithstanding the Act of 31 Ed. 3. but with these Cautions: (1.) That it be after the Administration granted, and Inventory made, so as the State of the Intestate may be known, and thereby the sum may appear to be competent. (2.) The Administrator must be called to it. (3.) The use must be publick and godly. (4.) It must be expressed in particular. And (5.) There must be a Decree made of it, and entered of Record.

Mich. 20 Jac.
in Cam. Stel-
lar. Sir. Jo.
Bennet's Case,
Co. Inst. par.
3. cap. 69.

(7.) The

(7.) The Court of *Audience*, *Curia Audientia Cantuariensis*. The Lord Coke touching the jurisdiction of Courts, taking notice of this of the *Audience* among other of the Ecclesiastical Courts, says, ^{a Co. Infl. 4. par. cap. 74.} That this Court is kept by the Archbishop in his Palace, and meddeth not with any matter between party and party of any contentious jurisdiction, but dealeth with matters *pro forma*, and Confirmations of Bishops Elections, Consecrations and the like, and with matters of voluntary jurisdiction, as the granting of the Guardianship of the Spiritualities *Sede vacante* of Bishops, Admissions and Institutions to Benefices, dispensing with Banns of Matrimony, and such like. This Court did belong to the Archbishop of Canterbury, and was in point of Authority equal with, but in point of Dignity and Antiquity inferiour to the Court of Arches. It seems that anciently the Archbishop of Canterbury did hear divers Causes of Ecclesiastical cognizance Extra-judicially, and at home in his own Palace, wherein, before he would come to any final determination, his usage was to commit the discussion thereof to certain persons learned in the Laws Civil and Canon, who thereupon were stiled his *Auditors*, whence in process of time it center'd in one particular person stiled, *Causarum Negotiorumque Audientia Cantuariensis Auditor seu Officialis*: And from hence the Original of this Court is properly derived. With this Office of the *Auditor* the Chancery of the Archbishop is said to have been heretofore commonly joyned, not controverting any matters of *contentious* jurisdiction in any decisions of Causes between Plaintiff and Defendant, but such onely as were *Voluntarie Jurisdictionis & ex Officio*, touching such things onely as are fore-specified, and such like. By the Provincial Constitutions it is Ordained, That for the ease of the People they may at times convenient (to be assigned by the Bishop) have access unto their Diocesan, *Et quod Prelati personaliter Audiant querelas* in his Cathedral, or next Parochial Church, *vel in aliqua Maneriarum suorum Capella, si talis fuerit*, Lindw. de Offic. Jud. Ord. cap. Statuimus, in gloss. verb. in Publico. It seems not altogether improbable, but that from the practice hereof this Court of *Audience* anciently had its Original, as aforesaid; And although it be not now in use as heretofore, yet considering the Subject-matter it onely took cognizance of, it was a good Expedient to prevent many Suits at Law in *Foro Contentioso*.

Vid. Hist. de
Antiq. Eccles.
Britan.

(8.) Faculty [Of, Court of Faculties] in the sense here meant and intended must not be understood according to its original and genuine signification, but as a term of Art according to a limited construction, restrained under that peculiar notion and particular understanding which the Law hath of it, in reference to a branch of the Ecclesiastical jurisdiction: And so it is understood and commonly

monly used for that Privilege or especial Power which is legally granted to a man by License, favour, indulgence and dispensation to have or to doe that, which otherwise by the Canon Law he could not; as to eat Flesh upon days prohibited; to marry without Banns first published; to hold two or more Ecclesiastical Benefices incompatible; the Son to succeed the Father in his Benefice, and such like. A *Faculty* granted to one, who is not Incumbent, to take a void Benefice, is void: But a *Faculty* to one, who is incumbent of a Benefice to retain the same is good. It is called *Faculties* in the Statute of 28 H. 8. cap. 16. Sir Ed. Coke makes mention of the Court of *Faculties*, although it holds no Plea of Controversie. It belongs to the Archbishop of *Canterbury*, and his Chief Officer thereof is called *Magister ad Facultates*, whose power is to grant Dispensations to the ends and purposes aforesaid; and so may every Diocesan, as to that of Marriage, and eating of Flesh on days prohibited. *Faculty* (according to Sir Ed. Coke in the place forecited) signifies a Dispensation: so that *Facultates* (in this sense) *Dispensationes & Indulta* are *Synonyma*. Who likewise there says, that this Authority was raised, and given to the Archbishop of *Canterbury* by the Statute of 25 H. 8. c. 21. whereby Authority is given to the said Archbishop and his Successors to grant Dispensations, *Faculties*, &c. by himself or his sufficient and substantial Commissary or Deputy for any such matters, commonly called the *Master of the Faculties*, and of all such matters as whereof heretofore such Dispensations, *Faculties*, &c. then had been accustomed to be had at the See of *Rome*, or by Authority thereof. For by the Stat. of 28 H. 8. c. 16. it appears the Bishop of *Rome* did grant *Faculties* and Dispensations to the Kings Subjects, as Pluralities, Unions, Trialities, Appropriations, Commendams, Exemptions. And the Judgment of Parliament expressed in the Preamble of that Statute of *Faculties* is very remarkable to this purpose; where it is recited, that the Bishop of *Rome* had deceived and abused the Subjects of the Crown of *England*, pretending and persuading them, That he had full power to Dispense with all humane Laws, Uses and Customs of all Realms, in all Causes which be called Spiritual: which matter hath been usurped and practised by him and his Predecessors for many years, to the great derogation of the Imperial Crown of *England*. For whereas the said Realm of *England*, recognizing no Superiour under God, but the King, hath been, and yet is, free from subjection to any mans Laws but onely to such as have been devised, made and ordained within this Realm for the weal of the same, or to such others as by sufferance of the King and his Progenitors the People of this Realm have taken at their free liberty, and by their own consent, to be used among them, and have bound themselves by long use and customs to the observance

vid. Vaugh.
Rep. f. 25.

Co. par. 4.
Inst. cap. 74.

p Trin. 44.
Eliz. C. B.
Rot. 1525.
lib. 4. fo. 117.
Lib. pl. Co.
p. 512, 513.
Pasch. 9 Jac.
C. B. en Ire-
land, le Casé
de Commenda,
in Davu
Rep.

servance of the same, not as to the observance of the Laws of any Foreign Prince, Potentate or Prelate; but as to the accustomed and ancient Laws of this Realm, originally established as Laws of the same by the said sufferance, consent and custome, and not otherwise: it standeth with natural equity and good reason, that all such humane Laws made within this Realm, or induced into this Realm by the said Sufferance, Consent and Custome should be Dispensed with, abrogated, amplified or diminished by the King and his Parliament, or by such persons as the King and Parliament should authorize, &c. *Vid.* 21 H. 7. 4. a. where it is said, That certain Priests were deprived of their Benefices by Act of Parliament in the time of R. 2. whereby it hath been concluded, that the King of England, and not the Pope, before the making of the said Statute of Faculties, might *de jure* Dispense with the Ecclesiastical Law in that and other cases. For although many of our Ecclesiastical Laws were first devised in the Court of Rome, yet they being established and confirmed in this Realm by acceptance and usage, are now become English Laws, and shall no more be reputed Roman Canons or Constitutions: As *Rebuffus*, speaking *De Regula Cancellaria Romanæ de verisimili notitia*, *Hæc Regula* (says he) *ubique in Regno Franciæ est recepta, & est Lex Regni effecta, & observatur tanquam Lex Regni, non tanquam Pape Regula; & Papa eam revocare non potest.* The Kings of England from time to time in every Age before the time of H. 8. have used to grant Dispensations in Causes Ecclesiastical; For whereas the Law of the Church is, That every Spiritual person is visitable by the Ordinary, King William the Conquerour by his Charter Dispensed with and exempted the Abby of Battell from Visitation and Jurisdiction of the Ordinary in these expresse words, *Sitque dicta Ecclesia libera & quæta in perpetuum ab omni subjectione Episcoporum, & quarumlibet personarum dominatione, sicut Ecclesia Christi Cantuariensis, &c.* whereby he Dispenses with the Law of the Church in that Case. *Vid. libr. De vera differentia Regiæ potestatis & Ecclesiasticæ. Edit.* 1534. where that whole Charter is recited at large. The like Charter was granted to the Abbey of Abingdon by King Kenelphus, 1 H. 7. 23. & 25. and *Cawdry's Case*, Co. par. 5. fo. 10. a. So likewise every Appropriation doth comprize in it a Dispensation to the Parson Imparsonée, to have and retain the benefice in perpetuity, as appears in *Grendon's Case*, Plow. Com. 503. In which Act the King by the Common Law shall be always Actour, not onely as Supreme Patron, but also as Supreme Ordinary; as is also observed in *Grendon's Case*. For the King alone without the Pope may make Appropriations. 7 E. 3. Fitz. *Quare Impedit* 19. And in the Case of *Malum prohibitum*, and *Malum in se*, 11 H. 7. 12. a. it is held, That the King may dispense with a Priest to hold two Benefices; and with

a Bastard, that he may be a Priest, notwithstanding the Ecclesiastical Laws which are to the contrary. And as he may *dispense* with those Laws, so he may pardon all Offences contrary to these Laws, and his Pardon is a barr to all Suits *pro salute animæ*, or *reformatione morum*, and all Suits *ex Officio* in the Ecclesiastical Court, *Hall's Case*, *Coke 5. par. fo. 51*. In all *Faculties* or *Dispensations*, for the holding of two Benefices, granted at the Court of *Rome*, there was always a particular *Derogation* or *Non obstante* the right of Patronage of Lay-Patrons, and of the right of the King by name express, where the Patronage belonged to him, otherwise the *Faculty* was void; For by the *Canon Law* the Lay-Patrons ought to be called to give their Consents in all Cases of that nature; And if such a particular *Non obstante* were not added to the *Faculty*, then there was inserted another Clause, *viz. Dummodo Patronorum expressum accedat Consensu*; also by another Clause Authority was always given to the Official or Archdeacon, or other Ecclesiastical Minister, to put him, to whom the *Faculty* is granted, into possession of the Benefice *cum acciderit*. And because by the *Canon Law* the Patron's consent was ever requisite in a *Commenda*, for that reason in every *Faculty* or *Licence* granted by the Pope to make a Permutation, Union or Appropriation of Churches, these words were ever added, *viz. Vocatis quorum interest*, which chiefly intends the Patron. And which Union and Approbation shall not according to Common Law be made without the Patron's assent. *Vid 11 H. 7. 8. 6 H. 7. 13. 46 Aff. p. 50. Ed. 3. 36. 40 Ed. 3. 26. Grendon's Case, Plow. Com. 498. a.* A *Faculty* or *Dispensation* is of such force, that if a Clerk be presented to a Benefice with Cure, and be Admitted, Instituted and Inducted into the same, so that the Church is full of him, if afterwards he be presented to another benefice Incompatible, or elected to a Bishoprick, and before he is instituted to the second Benefice, or be created Bishop, he obtain a *Faculty* or *Dispensation* to retain the first Benefice *Perpetua Commenda titulo*, that is, for his life, that *Faculty* or *Dispensation* shall be of such effect, that the former Benefice shall not be void by acceptance of the Second, or by promotion to the Bishoprick; but he shall remain full and perfect Incumbent of the first Benefice during his life. In the time of *H. 6.* when *Henry Beaufort*, Great Uncle to the King, being Bishop of *Winchester*, was made a Cardinal, and after that purchased from the Pope a Bull Declaratory, that notwithstanding he were made Cardinal, yet his Bishoprick of *Winchester* should not be void, but that he might retain the same as before; yet it was held, That the See of *Winchester* was void by assuming the Cardinalship, which exempts the Bishop from the Jurisdiction of his Metropolitan; And for that the Cardinal fell into a *Premunire*;

for which he purchased his Pardon, which is found among the Charters 4 H. 6. in *Archiv. Turr' Lond.* 6, & 7 Eliz. Dyer 233. a. Jo. Packhurst being elected to the Bishoprick of Norwich, before he was created Bishop, obtained a *Faculty* or *Dispensation* from the Archbishop of Canterbury, (by force of the Statute of *Faculties*) to retain a Parsonage which he had before in *Commendam*, for Three years, viz. à *Festo Michaelis An. Dom. 1560. usque ad idem Festum*, in *An* 1563. Before the first Feast of St. Michael, Packhurst is created Bishop, and afterwards he resigned the Benefice. And the Question was, whether that Benefice became void by the resignation of Packhurst; or by his Promotion to the Bishoprick? And it was Adjudged, That the Church became void by his Resignation: Which proves, That by virtue of the said *Faculty* or *Dispensation* he continued Parson untill he had resign'd. *Vid. N. Br.* 36. b. If a Parson who hath a *Faculty* or *Dispensation* to hold his Rectory, be created a Bishop, and after the Patron present another Incumbent, who is instituted and inducted, now the Bishop shall have a *Spoilation* against that Incumbent; which proves that his real possession in the Parsonage always continued by virtue of the said *Faculty* or *Dispensation*. And in this Case of a *Commendam* in Sir Jo. Davis Reports, this difference is put between a *Faculty* to take a Benefice, and a *Faculty* to retain a Benefice, viz. That a *Faculty* granted to one who is not Incumbent to Take a void Benefice, is void: And a *Faculty* to one who is Incumbent of a Benefice to Retain the same Benefice, is good. By virtue of these *Faculties*, *Dispensations* and *Provisions* from the Pope, Edmond the Monk of Bury, who was a Minister in the Court of King Edw. 3. had many Benefices; as appears in the foresaid Case of the Bishop of St. Davids, 11 H. 4. And Hankford said in the same Case, fo. 191. a. That by virtue of such *Faculty* one and the same person had been Abbat of *Glastenbury*, and Bishop also of another Church *simul & semel*, and had the Possessions and Dignity of both at the same time. Likewise Hen. Chicheley (who was afterwards Archbishop of *Canterbury*) being a Prebend in the Cathedral Church of *Salum*, was elected Bishop of St. Davids, and before his Consecration, the Pope reciting by his Bull, that he was elected Bishop of St. Davids, granted him a *Faculty* and power to hold and enjoy all his other Benefices, till the Pope should otherwise order, &c. *Vid. Nov. Decis. Rot.* 331. And that these *Faculties* or *Dispensations* to hold Benefices in *Commendam*, were granted in the Court of Rome in the time of King H. 5. appears in *Lindw. de Prab. c. Audistis ver. Dispensatione*. And although in Case of Hen. Beauford aforesaid, it was held, That the *Dispensation* came too late, it being granted after the Bishop was created Cardinal; yet afterwards in the

time

time of King *H. 8.* Cardinal *Wolsey*, having, before he was created Cardinal, obtained a Bull from the Pope, to retain the Archbishoprick of *Tork* as perpetual Administrator, and the Abby of *St. Albans* in perpetuum Commendam, he held both during his life by virtue of the said Faculty or Dispensation. *Vid. 27 H. 8. 15. b.* By these Presidents and Authorities it is evident, That before the making of the foresaid Statute of *Faculties*, such Dispensations were had and obtained at the Court of *Rome*, to hold in Commendam Ecclesiastical Benefices in *England*. But the truth is (as in the foresaid Case *de Commenda. Davis Rep.*) such *Faculties* or Dispensations granted by the Pope touching Ecclesiastical benefices in *England* were ever contrary to the Law of the Realm, for it was a mere usurpation on the Crown of *England* before the Statutes made against *Provisors*. And these Statutes were made in declaration of the Common Law in that point, 12 Ed. 2. *Fitz. Qua. Imp.* 169. 19 Ed. 2. *Fitz. Quanon admittit*, 7. 15 Ed. 3. *Fitz. Qua. Imp.* 165. 21 Ed. 3. 40. 11 H. 4. 230 a. It is also meet to be known, that long before King *H. 8.* the Statute of 16 R. 2. and divers other Laws against *Provisors*, and appeals to *Rome*, and the Popes Usurpation upon the Rights of the Crown of *England*, were made well-nigh as severe as any since. The first encroachment of the Bishop of *Rome* upon the Liberties of the Crown of *England* was made in the time of King *William the Conquerour*; for before that time the Pope's Writ did not run in *England*, his Bulls of Excommunication and Provision came not thither, nor were any Citations or Appeals made from thence to the Court of *Rome*. *Eleutherius* the Pope, within less than two hundred years after Christ, writes to *Lucius* the British King, and calls him God's Vicar within his Kingdom. *Pelagius* the Monk of *Bangor*, about *An. 400.* being cited to *Rome*, refused to appear upon the Pope's Citation, affirming, That *Britain* was neither within his Diocese nor his Province. And when about the year 600, *Augustine* the Monk was sent by *Gregory the Great* into *England*, to Convert the *Saxons*, the British Bishops then in *Wales* regarded neither his Commission nor his Doctrine, as not owing any duty to, nor having any dependance on the Court of *Rome*, but still retained their Ceremonies and Traditions, which they received from the East-*Church* upon the first plantation of the Faith in that Island. And though *Ina* the Saxon King gave the *Peter pence* to the Pope, partly as Alms, and partly in recompence of a House erected in *Rome* for English Pilgrims, yet certain it is, that *Alfred*, *Aethelstane*, *Edgar*, *Edmond*, *Cannus*, and *Edward the Confessor*, and other Kings of the Saxon Race, gave all the Bishopricks in *England* per Annulum & Baculum.

25 Ed. 1.

11 R. 2.

38 Ed. 3. c. 7.

27 Ed. 3. c. 1.

25 Ed. 3.

Davis Rep.

in the Case of

Pramunire,

fo. 87.

Ibid. fo. 88.

q Hill. 22.
Jac. B. R.
Rot. 2164.
Evans and
Kiffin verſ.
Askwith.
Jones Rep.
r Cokes Rep.
par. 11. &
Jones ibid.

r Dr. Stan-
diſh's Caſe.
Kelw. Rep.

* Vid. Cam-
dry's Caſe.
Co. Rep. par.
3. 55. and
Grendon's
Caſe. Flow.
Com.

(9.) In the Caſe of *Evans* againſt *Askwith*, it was agreed q, That the Nature of a *Dispensation* is, for to derogate and make void a Statute, Canon, and Conſtitution, as to that which it prohibits, as to the party, and it is an exception (as to him) out of the Statute or Conſtitution. It is ſaid, that a *Dispensation* is *Provida Relaxatio mali prohibiti neceſſitate vel utilitate penſata* r. And in the ſame Caſe it was alſo Reſolved by all the Judges, That the King hath power to Diſpenſe with *Statutes* and *Canons* in force within this Realm: By the very *Common Law*, of right it was in the King; for the *Canons* are the Eccleſiaſtical Laws of the Land, and do not bind, except they are received in the Realm, as appears by the *Statute* of 25 H. 8. c. 21. f. And by the *Statute* of *Merton*, touching that one was born before Marriage, as by the *Canon*, yet at *Common Law* he is legitimate. And 10 H. 7. 12. it is ſaid, That the King may Diſpenſe with one to hold two Benefices; and it ſeems the Pope *de facto* and by *Uſurpation* did uſe to Diſpenſe, and by the *Stat.* of 25 H. 8. ca. 21. the power is taken from the Pope and conferr'd *Cumulative* on the King t: And by the *Stat.* of 25 H. 8. the Archbiſhop of *Canterbury* may Diſpenſe in divers caſes; but that doth not exclude the Power of the King.

(10.) In the ſame Caſe it was held *per Curiam una voce*, That where a Dean is made a Biſhop, with a *Dispensation* from the King to hold the Deanry notwithstanding the Biſhoprick, ſuch *Dispensation* continues him Dean as before, by force and virtue of his former Title, to all intents and purpoſes, ſo as that he may confirm, or make Leases, or doe any other Act as Dean, as if he had not been made a Biſhop at all; For before the Canon or Conſtitution made at the Council of *Lateran*, for the voidance of the firſt Benefice by taking another Benefice or Promotion, it was lawfull and not forbidden ſo to doe: and the nature of the *Dispensation* is to exempt him from the penalty, and ſo it remains as if the Canon had never been made, which appears by 11 H. 4. in the Caſe of the Biſhop of *St. Davids*, That ſuch a perſon that had ſuch a *Dispensation*, being Defendant in a *Quare Imped.* counterpleaded the Title of the Plaintiff, which he could not doe by the *Statute* of 25 Ed. 3. unleſs he had been the Poſſeſſour thereof, and he in poſſeſſion by 4 H. 8. *Dyer* 1. is one who is and continues Incumbent by *Inſtitution* and *Induction*: Therefore in this caſe the firſt Title and *Induction* continues; And in the ſame Caſe it was alſo agreed, That ſuch *Dispensation* is not any *Proviſion*, for no new thing is done, but the ancient Title continues; And in *Fitz. N. B.* Brief *Spoliation*, ſuch a perſon may maintain a *Spoliation*, and none can maintain *that*, unleſs he continue his *Inſtitution* and *Induction*; *Parkhur's* Caſe, 6 & 7 *Eliz.* Such a *Commendam* continues to the perſon, be it

it that the Benefice be void by Resignation: And 21 Jac. in a *Quare Impedit* in C. B. by Woodley against the Bishop of Exeter and Manwayring, it was so Resolved and Adjudged, and the words of that Dispensation are sufficient; for it is to retain it during his life in *Commendam, aut modo quocunque de jure magis efficaci*, and all the profits thereto belonging, *ac cetera facere & perimplere qua ad Decanatum pertinent in tam amplis modo & forma*, as if he had not been promoted to be a Bishop, with a *Non obstante* to all Canons, &c. And so they all concluded, That the Dispensation continues him Dean, enabling him to confirm Leases made by the Bishop.

(11.) *W. Libels for a Legacy in the Ecclesiastical Court against B. who moves for a Prohibition, because he had there pleaded Plene Administravit*, and proved that by one Witness, and they would not allow it. *Richardson*, before the Statute of Ed. 6. the proper Suit for Tithes was there, and if they allow not one Witness to prove payment, a Prohibition shall be granted. And he put *Morris and Eaton's Case* in the Bishop of Winchester's Case, where it was Ruled; if the Ecclesiastical Court will not allow that Plea which is good in our Law, a Prohibition shall be granted, as in the Case of Tithes. And he said, the Case of a Legacy is all one. *Crook*, when one comes to discharge a thing by due matter of Law, and proves it by one Witness; if it be not allowed, no Prohibition shall be granted there. *Richardson*, Our Case is proof of *Plene Administravit* pleaded, which goes in discharge, and proves that by one Witness, and not allowed, a Prohibition shall be granted. *Hutton* said, That properly for a Legacy the Suit is in the Ecclesiastical Court: although they may sue in the *Chancery* for it, yet the proper Court is the Ecclesiastical Court. And they said, that they used to allow one Witness, with other good circumstantial proofs, if they be not in some Criminal causes, where of necessity there must be two Witnesses. In one *Haukin's Case*, Farmer of an Appropriation, Libels for Tithes of Lambs for seven years: And there payment was proved by one Witness, and a Prohibition was granted for Non-allowance. *Telverton*, There may be a difference where the Suit is merely Ecclesiastical for a Sum of Money, as for a Legacy, there the payment of the Legacy is of the nature of the thing, and the Ecclesiastical Court shall have Jurisdiction of the proof and matter. But if one gives a Legacy of twenty Oxen, and the other pleads payment of as much money in satisfaction, there they cannot proceed, but at Common Law, for that the Legacy is altered; And if a proof of one Witness is not accepted, a Prohibition shall be granted, for now it is a Legal Trial, 35 H. 6. If the Principal be proper for their Court, the Accessory is of the same nature. Also the Suit is commenced for a Le.

a Legacy, and the other pleads *Plene Administr.* there they proceed upon the Common Law: For they sometimes take that for Assets which our Law does not take. It was adjudged in the Kings-Bench, That where a proof by one Witness of a Release of a Legacy is disallowed, a Prohibition shall be granted. *Crook*, In this Case a proof of setting out of Tithes by one Witness disallowed, a Prohibition shall be granted ^u.

^u Pasch. 4.
Car. C. B.
Warner a-
gainst Parret.
Hutley's Rep.

(12.) One was obliged in the Ecclesiastical Court not to accompany with such a Woman, unless to Church or to Market overt. And afterwards he was summoned to the Ecclesiastical Court, to say whether he had broken his obligation or not. And *Ayliffe* moved for a Prohibition, which was granted; for that, that the Forfeiture is a Temporal thing; and it does not become them in the Ecclesiastical Court, to draw a man in Examination for breaking of Obligations, or for Offences against Statutes ^x.

^x Gammon's
Case, Hut-
ley's Rep.

C. Administrator *durante minori aetate* of his Brother's Son; the Son died, and made the Wife of H. his Executrix, who called C. to account in the Ecclesiastical Court for the Goods. And he pleads an agreement between him and H. and that he gave 80*l.* in satisfaction of all Accounts: But they did not accept the Plea; for that a Prohibition was prayed to be granted. *Richardson*, If the party received the money in satisfaction, then there shall not be a Prohibition granted; but if there were onely an agreement without payment of Money, then otherwise. *Crook*, It is Spiritual matter, and they have Jurisdiction, to determine of all things concerning that. But the Agreement prevents, that it cannot come into the Ecclesiastical Court ^y.

^y Creedland's
Case, Hut-
ley's Rep.

G. Libels against B. before the High Commissioners for an Assault made upon him, being a Spiritual person. And *Astbome* prayed a Prohibition; for that although their Commission by express words gives them power in that case, yet that Commission is granted upon the Statute of 1 *Eliz.* And it is not within the Statute: and although it be within the Commission, yet they have not Jurisdiction. The words of the Statute are, *That such Jurisdictions and Privileges, &c. as by any Ecclesiastical power have heretofore been, or lawfully may be exercised for the Visitation of Ecclesiastical State and Persons, and for reformation of the same, and for all manner of Errours, Heresies, Schisms, Abuses, Offences, Contempts and Enormities, &c.* These words extend onely to men who stir up Diffentions, in the Church, as Schismatics, and new-fangled Men, who offend in that kind. *Henden Serjeant*, The Suit is there for reformation of Manners; and before the New amendment of the Commissions, Prohibitions were granted, if they meddled with Adultery, or in Case of Defamations; but now by express words they

they have power of these matters. And that matter is punishable by the Commissioners for two Causes: (1.) There is within the Act of Parliament by the words annexed, *all Jurisdictions Ecclesiastical, &c.* (2.) It gives power to the Commissioners to exercise that; And that is merely *Ecclesiastical*, being onely *pro reformatione morum, &c.* The King by his Prerogative having Ecclesiastical Jurisdiction, may grant Commissions to determine such things, *5. Rep. Ecclesiastical Cases, fol. 8.* And *Richardson* said, The Statute *de Articulis Cleri* gave cognizance to the Ordinary for laying violent hands on a Clerk. But you affirm, That all is given to the Commissioners, and thereby they should take all power from the Ordinary: But by the Court, the Commissioners cannot meddle for a stroke in Church-Land, nor *pro subtractione Decimarum*. And yet they have exprefs Authority by their Commission; for by that course all the Ordinaries in *England* should be to no purpose. And so upon much debate a Prohibition was granted ².

On an Arrest on *Christmas*-day, it was said by *Richardson*. Chief Justice, That upon Arresting a man on *Christmas*-day, going to Church, in the Church-yard, he who made the Arrest, may be censured in the *Star-Chamber* for such an Offence. *Quod nota.* It was also said by *Richardson*, that if a man submit himself out of the Diocese to any Suit, he can never have a Prohibition, because the Suit was not according to the Statute, 23 H. 8. commenced within the proper Diocese, as it was adjudged. *Quod Nota.* ²

² *Giles a-*
gainst *But-*
lam. Hetley's
Rep.

² *Ibid. Het-*
ley's Rep.

If the Ecclesiastical Court proceed in a matter that is mere Spiritual, and pertinent to their Court, according to the *Civil Law*, although their proceedings are against the Rules of the Common Law, yet a Prohibition does not lie. As if they refuse a single Witness to prove a Will, for the cognizance of that belongs to them. And Agreed also, That if a man makes a Will, but appoints no Executour, that that is no Will, but void: But if the Ordinary commits the Administration with that annexed, the Legatary to whom any Legacy is devised by such Will, may sue the Administratour for their Legacies in the Ecclesiastical Court. *Note P. 4. Jac. C. R. Peep's Case*, a Prohibition was denied where they in the Ecclesiastical Court refused a single Witness in proof of payment of a Legacy ^b. After Prohibition, if the Temporal Judge shall upon sight of the Libel conceive, that the Spiritual Court ought to determine the cause, he is to award a *Consultation*. And by the Stat. of 30 E. 3. c. 4. the Ecclesiastical Judge may proceed by virtue of the Consultation once granted, notwithstanding any other Prohibition afterwards, if the matter in the Libel be not enlarged or changed.

^b *Vid. the Stat.*
24 E. 1.

^b *Chadron a-*
gainst *Harris.*
Noy's Rep.

B. Administratour of A. makes C. his Executour and dies; C. is
D d sued

fued in the Ecclesiastical Court to make an account of the goods of *A.* the first Intestate: And *C.* now moves for a Prohibition, and had it; for an Executour shall not be compell'd to an Account: But an Administratour shall be compell'd to Account before the Ordinary ^c.

* Sparrow ^a-
gainst Nor-
folk. Noy's
Rep.

* Hollmast's
Cafe. Noy's
Rep.

* Noy's Rep.
post Dr.
Cademan's
Cafe ver.
Grendan.

* Palmer ver.
Warner. Noy's
Rep.

* Post Scad-
ding's Cafe in
Noy's Rep.

Resolved by the Court, That a Prohibition shall not be awarded to the Admiral or Ecclesiastical Courts after Sentence; also that a Plea was there pleaded and refused, which was Triable at Common Law ^d.

Note, A Prohibition was awarded upon the Statute of 23 H. 8. because the party was fued out of the Diocefe. And now a Consultation was prayed, because the inferiour Court had remitted that Cause to the Arches, and their Jurisdiction also; yet a Consultation was denied ^e.

A Suit was in the Ecclesiastical Court, and Sentence passed for one with Costs, and nine months after the Costs are Asselt and Taxed; and then comes a Pardon of 21 Jac. which relates before the taxing of the Costs. But afterwards the Sentence and that Pardon was pleaded, and allowed in discharge of the Costs. Then *W.* who had recovered, fues an Appeal, and *P.* brought a Prohibition, and well, and no Consultation shall be awarded, because by the Court, that Pardon relating before the Taxation of Cost, had discharged them. As 5 Rep. 51. Hall's Cafe ^f.

B. and two others sue upon three several Libels in the Ecclesiastical Court, and they join in a Prohibition. And by the Court that is not good: But they ought to have had three several Prohibitions: and therefore a Consultation was granted. Mich. 26. & 27 Eliz. C. B. If *A.* libels against *B.* for three things, by one Libel, *B.* may have One or Three Prohibitions. *Note*, Dyer 171. ^g.

(13.) By the Statute of 25 H. 8. cap. 19. Appeals to *Rome* being prohibited, it is ordained, That for default of Justice in any of the Courts of the Archbishops of this Realm, &c. it shall be lawfull to Appeal to the King in his high Court of Chancery, and thereupon a Commission shall be granted, &c. And by a *Proviso* towards the end of that Statute, an Appeal is granted to the King in Chancery on Sentences in places exempt in such manner as was used before to the See of *Rome*. So that this Court grounded on the said Commission is properly as well as vulgarly called, *The Court of Delegates*, for that the Judges thereof are delegated to sit by virtue of the King's said Commission under the Great Seal upon an Appeal to him in Chancery, and that specially in Three Causes: (1.) When a Sentence is given in an Ecclesiastical Cause by the Archbishop or his Official. (2.) When any Sentence is given in

in any Ecclesiastical Cause in places exempt. (3.) When a Sentence is given in the high Court of Admiralty in Suits or Actions Civil or Maritime, according to the Civil Law. That this Court of *Delegates* may excommunicate^h, was resolved by all the Judges in the Archbishop of *Canterbury's* Caseⁱ. They may also commit or grant Letters of Administrations^k. This Court of *Delegates* is the highest Court for Civil Affairs that concern the Church, for the Jurisdiction whereof it was provided, 25 H. 8. That it shall be lawfull for any Subject of *England*, in case of defect of justice in the Courts of the Archbishop of *Canterbury*, to appeal to the King's Majesty in his Court of *Chancery*, and that upon such Appeal, a Commission under the Great Seal shall be directed to certain persons, particularly designed for that business: so that from the highest Court of the Archbishop of *Canterbury*, there lies an Appeal to this Court of *Delegates*. Of this Subject of Appeals the Lord *Coke* says, that an Appeal is a Natural defence, which cannot be taken away by any Prince or power, and in every Cause generally when Sentence is given, and Appeal made to the Superiour, the Judge that did give the Sentence is obliged to obey the Appeal, and proceed no farther untill the Superiour hath examined and determined the cause of Appeal. Nevertheless where the Clause (*Appellatione remota*) is in the Commission, the Judge that gave Sentence is not bound to obey the Appeal, but may execute his Sentence and proceed farther, untill the Appeal be revived by the Superiour, and an Inhibition be sent unto him: For that Clause *Appellatione remota* hath Three notable effects; (1.) That the jurisdiction of the Judge *à quo* is not by the Appeal suspended or stopped, for he may proceed the same notwithstanding. (2.) That for proceeding to Execution or farther process, he is not punishable. (3.) That these things that are done by the said Judge after such Appeal cannot be said void. for they cannot be reversed *per viam nullitatis*. But if the Appeal be just and lawfull, the Superiour Judge ought to have right and equity to receive and admit the same; and in that case he ought to reverse and revoke all mean Acts done after the said Appeal in prejudice of the Appellant. At the Parliament held at *Clarendon*, An. 10 H. 2. cap. 8. the Forms of Appeals in Causes Ecclesiastical, are set down within this Realm, and none to be made out of this Realm, *Ne quis appellat ad dominum Papam*, &c. so that the first Article of the Statute of 25 H. 8. concerning the prohibiting of Appeals to *Rome* is declaratory of the ancient Law of the Realm. And it is to be observed (says the Lord *Coke*) that the first attempt of any Appeal to the See of *Rome* out of *England*, was by *Anselme* Archbishop of *Canterbury*, in the Reign of *William Rufus*, and yet it took no effect. Touching the power

^h H. 10. Ja. B.
ⁱ per *Coke*.
^k Rol. Abr.
 ver. Prerogative, lit. G.
^h H. 10 Jac.

Co. Inst.
 par. 4. c. 74.

Dyer.
 Co. ubi supr.

Co. ibid.

and jurisdiction, of the Court of *Delegates*. *Vid* *le Cafe Stevenson versus Wood*. *Trin.* 10 *Jac.* B. R. Rot. 1491. in *Bulstr. Rep.* par. 2. wherein these Three points are specially argued, (1.) Whether the Judges *Delegates* may grant Letters of Administration? (2.) Whether in their persons the King may be represented? (3.) Whether the Court of *Delegates* may pronounce Sentence of Excommunication or not?

¹ Dyer 23 E-
liz. 371.
Co. Inst. par.
4. c. 74.

(14.) The *High Commission-Court* in Causes Ecclesiastical was by Letters Patents, and that by force and virtue of the *Statute* of 1 *Eliz.* cap. 1. the Title whereof is, *An Act restoring to the Crown the Ancient Jurisdiction Ecclesiastical*, &c. the High Commissioners might, if they were competent, that is, if they were Spiritual persons, proceed to Sentence of Excommunication¹. What the power of this Court was, and whether they might in Causes Ecclesiastical proceed to Fine and Imprisonment, is at large examined by the Lord *Coke* in the Fourth part of his *Institutes*, where he reports the Judgment and Resolutions of the whole Court of *Common Pleas* thereon, *Pasch.* 9 *Jac.* *Reg.* upon frequent Conferences and mature deliberation, set down in writing by the order and command of King *James*. Likewise whom, and in what cases the Ecclesiastical Court may examine one upon Oath, or not (there being a penal Law in the case; and whether the saying, *Quod nemo tenetur seipsum prodere*, be applicable thereunto. *Vid.* *Trin.* 13 *Jac.* B. R. *Burroughs*, *Cox*, &c. against the *High Commissioners*, *Bulstr.* par. 3.

* Co. Inst.
par. 4. c. 72.

(15.) The *Statutes* of 24 *H.* 8. and 25 *H.* 8. do Ordain, That, upon certain Appeals the Sentence given shall be definite, as to any farther Appeal; notwithstanding which, the King as Supreme Governour, may after such definitive Sentence grant a Commission of Review or *ad Revidendum*, &c. ^m Sir *Ed. Coke* gives two Reasons thereof, (1.) Because it is not restrained by the Statute. (2.) For that after a definitive Sentence, the Pope as Supreme Head by the Canon Law used to grant a Commission *ad Revidendum*; and what authority the Pope here exercised, claiming as Supreme Head, doth of right belong to the Crown, and by the *Statutes* of 26 *H.* 8. cap. 1. and 1 *Eliz.* cap. 1. is annexed to the same. Which accordingly was resolved *Trin.* 39 *Eliz.* B. R. *Hollingsworth's Case*; In which case Precedents to this purpose were cited in *Michelo's Case*, 29 *Eliz.* in *Goodman's Case*, and in *Huet's Case*, 29 *Eliz.* Also *vid.* *Stat.* 8 *Eliz.* cap. 5. In the Case between *Halliwel* and *Fervoice*, where a Parson sued before the Ordinary for Tithes, and thence he appeals to the *Audience*, where the Sentence is affirmed; then the party appeals to the *Delegates*, and there both Sentences are Repealed: It was agreed, that in such Case a Commission

Lib. Intr.
Rast.
fo. 15.
Appeal to
Rome ib.
Rome 389.

mission *ad Revidendum* the Sentences may issue forth; but then such a Reviewing shall be final without farther Appeal: But if the Commissioners do not proceed to an Examination according to the Common Law, they shall be restrained by a Prohibitionⁿ.

ⁿ More's Rep.

(16.) The Court of *Peculiars* is that which dealeth in certain Parishes, lying in several Dioceses, which Parishes are exempt from the jurisdiction of the Bishops of those Dioceses and are *peculiarly* belonging to the Archbishop of *Canterbury*: within whose Province there are fifty seven such *Peculiars*; for there are certain *Peculiar* jurisdictions belonging to some certain Parishes, the Inhabitants whereof are exempt sometimes from the Archdeacons, and sometimes from the Bishops jurisdiction.

(17.) If a Suit be in the Ecclesiastical Court for a *Modum Decimandi*, if the Defendant plead payment, it shall be tried there, and no Prohibition may be granted, for that the Original Suit was there well commenced^o. So if payment be pleaded in a Suit depending in the Ecclesiastical Court for any thing whereof they have the original cognizance^p. But if a man sue for Tithes in the Ecclesiastical Court against *J. S.* and make Title to them by a Lease made to him by the Parson; and *J. S.* there also makes Title to them by another Lease made to him by the same Parson; so that the Question there is, which of the said Leases shall be preferred; In this case a Prohibition shall be granted, for they shall not try which of the said Leases shall be preferr'd, although they have cognizance of the Original; for the Leases are Temporal^q. If a man having a Parsonage Improprite make a Lease for years of part of the Tithes by Deed, and the Deed be denied in the Ecclesiastical Court, and Issue taken thereon, a Prohibition shall be granted^r. If a Parson compound with his Parishioner for his Tithes, and by his Deed grant them to him for a certain Sum for one year according to agreement, and after he sue the Parishioner in the Ecclesiastical Court for Tithes in kind: no Prohibition to be granted on that discharge by Deed; for they may well try that, having cognizance of the Principal^s. If a Parson Lease all the Tithes of his Benefice to the Parishioner, and after sue him in the Ecclesiastical Court for his Tithes in his hands; no Prohibition to be granted, for the Lease is a good discharge there^t. Likewise, if the Parishioner grant Land to the Parson for and in lieu of his own Tithes, and after the Parson sue him in the Ecclesiastical Court for the Tithes; no Prohibition to be granted, for that matter will be a good discharge there^v. If a Parson sue for Tithes in the Ecclesiastical Court, and the Defendant there plead an Arbitrement in Bar, they shall try that there; and no Prohibition to be granted upon that, &c. for by intendment it is a good discharge there^x.

Like-granted.

^o Mich. 14.
Jac. B. R. inter
Gesslin and
Harden. Ag-
reed per Cu-
riam. Hob.
Rep. Case 314.
^p Rol. Abr.
var. Prohibi-
tion, p. 306.

^q M. 12 Jac.
B. R. Wrots &
Clifton. per
Cur. Rol. ibid.
^r Pasch. 3 Jac.
B. per Cur.
Rol. ibid.

^s 3 E. 4. Rol.
ibid. nu. 5.
^t 3 E. 4. 14.
per Choke.
^v Ibid.

^x P. 12 Jac.
per Cur. Pro-
hibition den-
ied. Trin.
12 Jac. B. R.
inter Reynolds
& Hayer. Ad-
judg. and
Consulation.

- Likewise, if a Parson sue for Tithes in the Ecclesiastical Court, and the Defendant there plead a Lease of them by Deed by the Parson to him rendring Rent; to which the Plaintiff says, the Rent was reserved upon condition of Non-payment to be void, and avers, that it was not paid at a certain day, and the other pleads payment at the day: This shall be tried there, and no Prohibition granted ⁷.
- ⁷ Tri. 16 Jac. B. R. inter Griffin and Bullast. per Cur. Rol. ib. Du. 12. If a Parson lease by Deed the Tithes of the Parish, and after sues for the Tithes in the Ecclesiastical Court, and there the Lease is pleaded, where the Question between them is, whether it be the Tithes of the whole Parish, or onely of some particular things? yet no Prohibition lies, for they have Cognizance of the Original; but if they judge contrary to the Common Law, a Prohibition lies after Sentence ².
- ² Mich. 13 Car. B. R. inter Dr. Po-clington and Sr. Saint John. If a man sue for a Legacy in the Ecclesiastical Court, and the Defendant plead a Release in Bar, and the Plaintiff denies it; that shall be tried there, for that it arises from the Original cause whereof they have the Jurisdiction ⁴. If an Administratour sue for a Legacy due to the deceased in the Ecclesiastical Court, and the Defendant plead the Release of the deceased in Bar, and the Plaintiff avoid it, for that the deceased was an Idiot; That *Idiocy* shall be tried there, and no Prohibition granted, for that they have jurisdiction of the original matter ⁵. If a Parson sue in the Ecclesiastical Court, and the Defendant there plead, that the Plaintiff was presented upon a *Symoniacal* Contract against the *Stat.* of 31 Eliz. That shall be tried there, for that they have Jurisdiction of the Original thing ⁶. But the Ecclesiastical Court can take no cognizance of a Custome whereby the Inheritance is perpetually charged, although the thing Customable be cognizable by them; and therefore if the Church-wardens of the Parish of *S.* Libel in the Ecclesiastical Court against *J. S.* Farmer of the Farm of *D.* for a Contribution to the Reparation of the Church, and alledge, that part of the Farm lies in the Parish of *S.* and part thereof in the Parish of *W.* and alledge a Custome, that the Farmers of the said Farm have used time out of mind to contribute to the Reparation of the Church of *S.* throughout the whole Farm: if the Defendant saith, that part of the Land of the said Farm lieth within the Parish of *W.* and that it had used time out of mind, &c. for that part to contribute to the Church of *W.* and not to *S.* and so deny the said Prescription: This shall not be tried in the Ecclesiastical Court, but at the Common Law, and for that a Prohibition lies; for they shall not try a Custome in the Ecclesiastical Court, by which the Inheritance is to be perpetually charged ⁸.
- ⁸ Tr. 16 Jac. B. R. between the Church-Wardens of Steevenage and Green resolved. If *A.* the Parson of *D.* sue for Tythes in the Ecclesiastical Court against *B.* who pleads a Lease for years made to him by the Parson; to which *A.* the Parson replies, That he was *Non-resident*, and absent

sent 80 days and more in such a year, &c. from his Benefice, by which the Lease became void: No Prohibition lies upon that Plea, for that it is grounded on the Statute of 13 Eliz. and although it was objected, That the Judges Ecclesiastical shall not have the exposition of a Statute; yet for that they have jurisdiction of the original cause, they shall have power to try that which incidently doth arise from thence; and the Prohibition was denied.

(18.) A Prohibition was prayed upon the Statute of 23 H. 8. for suing for a Legacy of Ten pounds in the Prerogative Court, whereas the party did dwell in another Diocese; but because the Will was proved in that Court, and there Sentence was given for the Legacy, and an Appeal upon the Sentence to the Delegates, where it was affirmed, and endeavour was to stay the Suit by the Statute, the party having so long allowed of the jurisdiction of the Court; *Adjudged*, the party came too late now to have a Prohibition.

(19.) In *Norwood's Case* it was held, That where a man is sued in the Ecclesiastical Court for slanderous words, a general Pardon doth not aid the party, for staying the Suit there, which is for *ad instantiam partis*, but contrary where the party is sued there *ex officio Judicis*.

(20.) In order to a Prohibition it was surmised, That the Defendant was a Clerk, and assaulted his Servant, and he coming to keep the peace and to aid his Servant, laid his hands peaceably upon the Defendant; for which he sued him in the Ecclesiastical Court, where he pleaded this matter, and they would not allow of his plea; It was said by the Justices, That this Case was out of the Statute of *Articuli Cleri & circumspicite agatis*; for here the party had *Quere* by what Law; for this is not in the Case of *Se Defendendo* good cause to beat the Clerk, and a Prohibition was granted.

(21.) By the Justices, if Issue be joined, whether a Church be void by *Cession*, *Deprivation*, or *Resignation*, it shall be tried by the Countrey, because it is a thing mixt; for the avoidance is Temporal, and the Deprivation is Spiritual: But *Habitatio*, *Bastardy*, *ne unque accouple en Loyal Matrimony* shall be tried by Certificate of the Bishop; but *Bastardy* pleaded in a stranger to the writ shall be tried by the Countrey.

(22.) A Sentence was given definitive in the Ecclesiastical Court in a Suit there for Tithes, *pro triplici valore*, a Prohibition was prayed; a special Prohibition was awarded, That they should not proceed to the Execution of the Sentence, as to the treble value, because that Court is not to give the treble value but the double value only.

(23.) In:

Hill. 14.
Car. B. R. inter Sr. Tho. Lucy and Dr. Lucy per Cur. Roll. ubi supr. p. 308. nu. 22. Mich. 3 Car. C. B. Smith and Executors of Poyndrell's Case. Cro. p. 3.
Trin. 41 Eliz. B. R. *Norwood's Case*. Cro. par. 1.

Hill. 41 Eliz. B. R. *Kolley and Walker's Case*. Cro. par. 1.
Vid. *More's Case* 1227.

Patch. 6 Eliz. *More's Rep.*

Girrye's Case. *More's Rep.*

(23.) In a Case between a Parson and Church-wardens against one *Reynolds*, it was suggested, That all those who had the House wherein the said *Reynolds* did dwell, had used to find meat and drink for the Parson and them, going in Procession in Rogation-week, at his house; and because he did not find them meat and drink, they sued him in the Ecclesiastical Court, and a Prohibition was awarded, because the Custome was a Custome against the Law.

(24.) In *Babinton's* Case it was Resolved, That if one be sued in the Ecclesiastical Court *ex officio*, or by Libel, and he demand the Copy of the Libel which is denied; That a Prohibition lieth in such case. *Vid. Stat. 2 H. 4.*

(25.) In a Prohibition upon a Libel in the Ecclesiastical Court, where the Suit was for Tithe-Apples, in discharge of which he there pleaded an Award, which was, That he was to pay so much for the Tithe; pleads there the Arbitrement, the which plea they refused, supposing this to be void: upon this a Prohibition prayed. *Coke*, We will not grant a Prohibition in this case: So in a Suit there for a Legacy, if payment of the same be there pleaded, which is not sufficient, the payment is triable there by 1 R. 3. f. 4. When the Original begins in the Ecclesiastical Court, although that afterwards a matter happens in Issue, which is triable at the Common Law, yet this shall be tried there by the Ecclesiastical Law: As if one do sue there for a Horse to him devised, the Defendant there pleads, that the Divisor did give this Horse unto him in his life time; This is triable by our Law, yet this shall be tried there by their Law. In the same manner it is, where the Original doth begin here, the same shall be tried here by our Law, as in a *Quare Impedit*, able or not able; if it were otherwise, they should there try nothing. This is belonging to them; But if they will there draw the matter *ad aliud examen*, as upon proof of a Deed, they Judge otherwise than we do: As in case of a Lease for years to be made, they hold the same to be *Traditione*, or void; And so a Grant of Goods to be *delivered*, or not good. If they will judge in Common Law matters, otherwise than we do, there in such a case a Prohibition lies: That which we call Orders, they amongst them do call Acts: The Court all clear of Opinion, That this Plea of the Award there pleaded, and by them refused, no ground for a Prohibition: and so by the Rule of the Court a Prohibition was denied. And in *Dike's* Case against *Brown* a Prohibition was denied, and a *Consuetudo* granted, because the Ecclesiastical Court (as was then admitted) having cognizance of the Principal, hath cause also there to determine of the Accessory.

(26.) If

(26.) If a Parson sue upon the Stat. of 2 Ed. 6. in the Ecclesiastical Court for the double value for not setting forth the Tithes, and the Defendant surmise, That he did set them forth, and that they would not there allow or admit the proof thereof by one Witness; no *Prohibition* lies for that, because they have cognizance of the matter^f. In this case the *Prohibition* was denied *per Curiam*.

Hill. 9 Car. B. R. inter Tolle & Sr. Ed. Powell. Vid. Rol. Abr. Prohibition, p. 299. nu. 10.

(27.) If the Bounds of a Village in a Parish come in question in the Ecclesiastical Court, in a suit between the Parson Improprite and the Vicar of the same Parish, as if the Vicar claim all the Tithes within the Village of *D.* within the Parish, and the Parson all the Tithes in the residue of the Parish; and the question between them is, Whether certain Lands, whereof the Vicar claims the Tithe, be within the Village of *D.* or not, yet inasmuch as it is between Spiritual Persons, viz. between the Parson and the Vicar, although the Parson be a Lay-man, and the Parsonage appropriate a Lay-fee, yet it shall be tried in the Ecclesiastical Court, and no *Prohibition* be granted; And in this case the *Prohibition* was denied^g.

Hill. 15. Car. B. R. between Ives and Wright. per Cur.

(28.) Where Suit hath been in the Ecclesiastical Court for some thing Spiritual mixt with other matter triable at Common Law; In such case a *Prohibition* hath been granted as to the matter triable by the common Law, and not as to the rest, if they may be severed^h. As if a Suit be in the Ecclesiastical Court to avoid the Institution of one who is instituted to *A.* his Chapel of ease as he pretends; if the other suggest, That *A.* is a Parochial Church of it self: a *Prohibition* lies as to a Trial, whether it be a Parochial Church of it self or not, for that they shall not try the Bounds of the Parish; but not as to a Trial concerning the Institution, for that belongs to the Ecclesiastical Court to examine whether it be well done, or notⁱ. But *Houghton* said, they cannot well try the Institution without trying the Bounds of the Parish^k. If a Testament be made of Lands and Goods, and there be a Suit in the Ecclesiastical Court for the Goods, and the question be, whether the Testator did revoke his Will in his life time, or not, a *Prohibition* lies as to the Land, and not as to the Goods^l. So if a man sues for the Probate of a Testament in the Ecclesiastical Court, and in the Testament there be Lands devised, and other personal Goods, a *Prohibition* lies as to the Land, and not as to the rest^m. Upon an Allegation in such case, That the Devisor revoked his Will before his death, a *Prohibition* was granted as to the Landⁿ.

Mich. 14. Ja. B. R. Fish and Chamberlain Resol. con. M. 8. Ja. per Cur. Jenner's Case. Roll. Ab. p. 314. Case Fish and Chamberlain. Roll. ubi supr. Mich. 13. Jac. B. inter Achil & Achil Resolv. Jac. B. R. Bancroft's Case.

Mich. 14. Hill. 14. Ja. B. R. Nevil and Boyer vers. Winchcomb.

(29.) If a man be sued out of his Diocese, and there Answers without taking Exception thereunto, and afterwards Sentence be given against him, he shall not after have a *Prohibition*, for that he

did not take Exception to the Jurisdiction before, but affirmed the Jurisdiction; In this case *Prohibition* hath been denied^o. If it appears in the Libel, that the Court hath not Jurisdiction of the cause, a *Prohibition* lies after Sentence; but otherwise it is, if it doth not so appear in the Libel, but by averment^p. Generally, if a Suit be in the Ecclesiastical Court, and Sentence there given for the Plaintiff, and thereupon the Defendant Appeals, and after prays a *Prohibition*; no *Prohibition* is to be granted, although if he had come before Sentence, it ought to have been granted, for that it is inconvenient, after so much expence and no Exception taken to the Jurisdiction, then to grant a *Prohibition*^q. Where a man by intendment shall have remedy by Appeal, no *Prohibition* lies; And therefore if a man devise a Legacy to *B.* to be paid him within one year after his death, *provided*, that if he die within the year, that then the Legacy shall be void, and shall be divided between *D.* and *E.* and after *B.* die within the year, and his Executor sue for the Legacy, and Sentence given for him, for that they there held the Condition to be void: yet no *Prohibition* lies, for that by intendment he hath his remedy by Appeal; and in this case a *Prohibition* was denied^r. If a man hath a *Prohibition* on a Libel for Tithes of Faggots, on a Suggestion, that the Faggots were made of great Trees above twenty years growth, and in the Suggestion the quantity of Faggots be mistaken; yet if it appears that he made his Suggestion according to the Copy of the Libel given him by his Proctor, no *Consultation* shall be brought, for by the Statute of

^o Pasch. 15.
Jac. B. R. inter
Pudsey
and Richard-
son. per Cur.
^p Mic. 8. Ja.
B.

^q Hill. 9 Car.
B. R. Frize-
well's Case.

^r Mich. 21
Jac. B. R.
Cluk's Case
Resolved.

^s Mich. 4 Ja.
B. R. inter
Swinerton
and Man
Adjudged.

^t Stranham
and Culling-
ton's Case.
Cro. par. 1.

^u Dullingham
and Kiseley's
Case. Cro. ibi.

(30.) The Case was, where *A.* sued *B.* for Tithes within the Parish of *C.* — *B.* said, they were within the Parish of *D.* and the Parson of *D.* came *pro interesse suo*, and they proceed there to Sentence. Question, if in such a Parish, or such a Parish, shall be tried by the Law of the Land or of the Church? *Wray* said, It was Triable by the Common Law: *Fenner* said, the Pope hath not distinguished of Parishes, but Ordained, that Tithes shall be paid within the Parish^t.

(31.) *R.* Parson of *S.* sued *C.* in the Spiritual Court for Tithes of certain Lands in the Parish of *S.* — *D.* Plaintiff in the *Prohibition*, came *pro interesse suo*, and said there was a Custome within the Parish of *S.* that the Parson of *H.* shall have Tithes 13 Cheeses of the Lands in *S.* and in recompence thereof the Parson of *S.* had 13 Cheeses for the Tithes of *H.* It was said, the Right of Tithes were in question, and not the Bounds of the Parish, and therefore no *Prohibition*; and of that opinion was the Court, and a *Consultation* awarded^u.

(32.) If an Administrator be granted to *A.* where it ought not to be granted to him, and after the Administration be Repealed and granted to *B.* for he that is the next of Kin; In this case *B.* may sue *A.* in the Ecclesiastical Court to Account for the profits of the Goods and Chattels of the Deceased during his time, and no *Prohibition* to be granted, for he cannot have an Action of Trespass against *A.* nor hath he any remedy for them at the Common Law *.

(33.) A Parson may sue in the Ecclesiastical Court for a *Modus Decimandi*, and no *Prohibition* shall be granted, for it is in the nature of Tithes ⁷. But a *Prescription* cannot be tried in the Ecclesiastical Court, for that ought to be tried by a Jury, which cannot be there *. Yet if a Parson prescribe to have Tithes of things not Tithable, as of Rents of Houses, he may sue for that in the Ecclesiastical Court, and no *Prohibition* lies; yet no Tithes *de jure* ought to be paid of them *. So he may sue in the Ecclesiastical Court for the Tithes of great Trees, which he claims by Prescription, and no *Prohibition* lies, yet *de jure* they are not Tithable. *Quere* 9. H. 6. 46.

(34.) If there be a Custome, that after the Grass is cut and set into Grass-Cocks, the Tenth Cock be assigned to the Parson, and that by the Custome it shall be lawfull for him to make the same into hay upon the Land, and the owner of the Land disturb him from making the same, he may sue for that in the Ecclesiastical Court; and no *Prohibition* shall be granted, for that is incident to the Custome to come there to make the same into Hay ^b. Also the proper place to sue for a Legacy, is the Ecclesiastical Court, for that it is not any Debt, but onely due by the Will. If *A.* do owe to *B.* five Marks, and he devise by his Will, that whereas he doth owe five Marks to *B.* his Executor shall make it 10 *l.* The Suit for that 10 *l.* may be in the Ecclesiastical Court, for that is not any Addition to the five Marks, but a new Summ given in satisfaction of the five Marks, and so no part of the 10 *l.* any Debt, but onely a Legacy ^c. Also if a man devise a Rent out of his Stock and House which he hath for years, the Devisee may sue for that Rent in the Ecclesiastical Court, for that it issues out of a Chattel, and no remedy for it at the Common Law ^d. If a man possessed of a Lease for years, Devise that his Executor shall out of the Profits thereof pay 20 *l.* to each of his Daughters at their full Age, the Executor may be sued in the Ecclesiastical Court to put in Sureties to pay the Legacies, and no *Prohibition* shall be granted, for that is to issue out of a Chattel ^e.

(34.) If there be a Question between two persons touching several Grants, which of them shall be Register of the Bishop's

* Hill. 15 Jz.
B. R. Wadsworth and Andrew's Case Adjudged.

* Co. 11.
Dr. Grant, 16.
Temp. E.
1. Roll. Abr.
p. 28. nu. 16.
Co. ubi sup.

* Mich. 14.
Jac. B. Reynolds and Newbury.
Rol. Abr.
pag. 284.

* Mich. 22
Jac. B. R. Churley and Wood. Prohibition denied.
* Hill. 7 Jac. B. Mary James Case. per Curiam, Prohibition denied.

* Hill. 11 Jz.
B. Prowie's Case per Cur.

Court; that shall not be tried in the Bishop's Court, but at Common Law, for although the *Subjctum circa quod* be Spiritual, yet the Office it self is temporal ^f. Also if a man set forth his Tithes by severance of Nine parts from the Tenth, and after carry away the Tenth part; the Parson cannot sue for that in the Ecclesiastical Court, for that by the severance of the nine parts it did become a Chattel, for which he might have his Action of Trespafs ^g.

(36.) It is Reported, That if a Suit be in the Ecclesiastical Court against a Woman for exercising the Trade of a *Midwife* without Licence of the Ordinary contrary to the Canons, a Prohibition lies, for that is not any Spiritual Function whereof they have cognizance. And in this case Prohibition was granted to the Court of Audience ^h.

(37.) The Ecclesiastical Court may not try the Bounds of a Parish, and therefore if Suit be there on that matter, a Prohibition lies ⁱ. So if the Question there be, whether such a Church be a Parochial Church, or but a Chapel of ease, a Prohibition also lies ^k. In the Case between *Elie* Vicar of *Alderburne* in the County of *Wilts* and *Cooke*, Prohibition was granted, and thereupon Issue joined, whether several Parishes, and tried by Verdict to be one Parish.

(38.) Where a Man sued for a Legacy in the Ecclesiastical Court against an Executor, and he there pleaded, that he had not Assets save onely to pay the Debts, and the said Court disallow'd of that plea, a Prohibition was granted ^l.

(39.) If a Man sues in the Ecclesiastical Court to have an Account for the profits of a Benefice, a Prohibition lies, for that it belongs to the Common Law ^m. But if the Suit be for the profits taken during the time of Sequestration, no Prohibition lies ⁿ.

(40.) In *Worr's* and *Clysson's* Case, where the Plaintiff sued for Tithes in the Ecclesiastical Court by virtue of a Lease made by the Vicar of *T.* for three years: the Defendant prayed to be discharged of Tithes by a former Lease: The Plaintiff in the Ecclesiastical Court, prayed a *Prohibition* to stay his own Suit there; It was granted by the Court, because they are not to meddle with the Trial of Leases, or real Contracts there, although they have Jurisdictions of the original Cause, viz. the Tithes ^o.

(41.) In *Collier's* Case, upon the endowment of a Vicarage upon an appropriation, it was ordained by the Bishop, That the Vicar should pay yearly 20 *l.* to the *Precentor* in the Cathedral Church of *S.* to the use of the *Vicars Chorals* of the said Church: It was held by the Court, that this is a *Pension*, for which Suit shall be in the Ecclesiastical Court ^p.

(42.) In

^g Hill. 8 Jac.

B. said by

Coke to be

Skinner and

Mingey's Case.

^h Dubitatur

Pasc. 40 El.

B. R. inter

Leigh & Wood

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(42.) In the Case between *Draiton* and *Cotterill* against *Smith* for a *Prohibition*, it was said by *Coke* Chief Justice, That if the Parson sues in the Ecclesiastical Court for Tithes, and the other pleads a *Modus* to the Vicar, this *Modus* now can never come in question by this Suit between the Parson and him, for Tithes due unto the Parson, but this is to be questioned and determined there in the Ecclesiastical Court, to whom the Tithes do belong, whether to the Parson or to the Vicar? And this hath been divers times adjudged in this Court, and in the Court of C. B. in *Bushe's* Case, for *Pan-keridge-Church*: and it hath always been clearly held, That if the Right of Tithes come into question between the Parson and the Vicar, to which of them the same do belong, This is a Suit properly belonging to the Ecclesiastical Court to hear and determine the same, and in such case they are not there to be ousted of their Jurisdiction. And this being now a Question between the Parson and the Vicar, to which of them Tithes did belong, for which the *modus* is alledged to be paid; therefore no *Prohibition* to be granted in this case, though there be a *Modus* suggested to be paid unto the Vicar, for all Tithes here due to the Vicar and Parson, the Parson suing for the Tithes there, as due unto himself, and not unto the Vicar. And so the Question is as touching the Right of Tithes between the Parson and the Vicar; which is a Suit proper for the Ecclesiastical Court. And this is to be observed for a sure Rule, in such a case never to have a *Prohibition* granted; The reason of this is, because that the *Modus* suggested to be paid, cannot come in question upon this Suggestion of this payment unto the Vicar, but onely the Right of Tithes, to whom they belong, whether to the Parson or to the Vicar; and divers Judgments have been accordingly given in the like Case; And so by the Rule of the whole Court a *Prohibition* was denied.

Mich. 11 Ja.
B. R. Bulstr.
par. 2.

(43.) Whether, and how far, and in what manner the Ecclesiastical Court may exercise its Jurisdiction in cognizance of a *Modus Decimandi* is at large argued and debated at the Bench in *Harding's* Case against *Goseling*, where in a *Prohibition* to stay Proceedings in the Ecclesiastical Court, upon a Suit there for Tithes, where *G.* Libelled against *H.* for a *Modus Decimandi*, being not paid, and there *H.* alleadged another *Modus Decimandi*, which Allegation the Ecclesiastical Court refusing to admit, a *Prohibition* was thereupon prayed in B. R. In this case *Doderidge* Justice said, That the *Modus Decimandi* is as well due to the Parson, as Tithe is at the Common Law; and if the Parson do Libel in the Ecclesiastical Court for a *Modus Decimandi* (as he may doe) and another *Modus* is there alledged, and this refused, the Ecclesiastical Court may try and determine this matter touching this *Modus*, and

Mich. 14 Ja.
B. R. Har-
ding and o-
thers against
Goseling.
Bust. par. 3.

no

no cause to grant a *Prohibition* for this refusal: But if the Ecclesiastical Court doth deny to admit the Allegation for the *Modus* upon this ground onely, because the practice of the Ecclesiastical Law and our Law do differ in the manner of proof; as for default of two Witnesses, one being allowed at Common Law, but not at the Ecclesiastical Law, In this Case a *Prohibition* is grantable; but otherwise the Ecclesiastical Jurisdiction may as well try the *Modus Decimandi*, as the Right of Tithes. But if a Parson doth Libel there for Tithes in kind, and a *Modus* is alledged and there pleaded, but refused to be admitted or allowed: in that Case a *Prohibition* is granted upon such Refusal. *Haughton* Justice, In this Case a *Prohibition* ought to be granted, otherwise in such Cases, upon every small difference alledged in the *Modus*, that Court may try and determine the validity of every *Modus Decimandi*, which the Ecclesiastical Court cannot doe by the Law: for that Court is not permitted by our Law to try a *Modus Decimandi*; and therefore that Court proceeding to try this *Modus*, which is determinable by Common Law, and not in the Ecclesiastical Court, a *Prohibition* ought to be granted. But *Doderidge contra*, No *Prohibition* is in this case to be granted, for the Ecclesiastical Court may well try and determine this *Modus* by that Law; the Libel being there originally for the *Modus*: But if touching the Proof of this *Modus* as aforesaid, the difference of proceedings between the two Laws, (one Witness being sufficient at the Common Law, not so at the Ecclesiastical) be the ground of the Refusal of the Allegation, then a *Prohibition* is to be awarded, so is 1 R. 3. and 10 H. 7. but if the Ecclesiastical Court onely proceed to try the *Modus*, for which the Libel was there, this by proof may well be there examined. *Croke* Justice, at this time delivered no opinion at all in this Case. Afterwards, this Case being moved again, *Doderidge*, If a Parson do Libel in the Ecclesiastical Court for a *Modus*, whereas in truth there was no *Modus*, but onely a composition of late time between the Parson and the Parishioners, to pay so much yearly for Tithes, and not otherwise: In this Case, because that the common Law and the Ecclesiastical do differ in the point of *Prescription*, (Ten years continuance being a good *Prescription* by that Law; but not so by ours) in this case a *Prohibition* is grantable. *Houghton*, A *Modus Decimandi* is properly to be tried and determined by the Common Law, and not in the Ecclesiastical Court, for that these two Laws differ in many things, as in point of proof of a *Modus*, and in the point of *Prescription*. *Croke*, A Special *Modus* being Libelled for in the Ecclesiastical Court, is there to be tried. *Doderidge*, If the Ecclesiastical Court doth refuse to allow of the proof, allowable at the Common Law, a *Prohibition* lies to stay proceedings

dings for Tithes there: And whereas there is a *Modus*, if they refuse to pay this, the Parson may sue for this *Modus* in the Ecclesiastical Court, and this is to be tried there; But if in such case where there is a *Modus*, if the Parson will Libell to have his Tithe in kind, and the other shews there this *Modus*, which they will not allow of, a *Prohibition* lies, and this shall be tried by the Common Law. The Court declares That they would see the Suggestion, and therefore by the Rule of the Court they were to make their Suggestion, and to shew the same to the Court, as they would stand unto it, and in the mean time the Suit in the Ecclesiastical Court to be stayed.

(44.) To conclude this Chapter, it may not be impertinent to enquire, when and how the *Canon Law* was introduced into this Realm of England; In the Case of a *Commendam* that was Adjudged in Ireland, it was observed, That after the Bishop of Rome had assumed or took upon him to be the Spiritual Prince or Monarch of all the World, he attempted also to give Laws to all Nations, as one real Mark or Signal of his Monarchy; but they well knowing, *Quod ubi non est condendi autoritas, ibi non est parandi necessitas*, did not impose their Laws at first peremptorily on all Nations without distinction, but offered them *timide & precario*. And therefore he caused certain Rules in the first place to be collected for the Government of the Clergy onely, which he called *Decreta*, and not *Leges vel Statuta*; These *Decrees* were published in An. 1155. which was during the Reign of King Stephen. And therefore what the Lord Coke observes in the Preface to the Eighth part of his Reports, *Quod Rogerus Bacon, frater ille perquam eruditus, in Libro de Impedimentis Sapientia; dicit, Rex quidam Stephanus, allatis Legibus Italia in Angliam, Publico Editto prohibuit ne in aliquo detinerentur*, may probably be conjectured, to be meant and intended of those *Decrees* which were then newly compiled and published: Yet these *Decrees* being received and observed by the Clergy of the Western Churches onely, (for the Eastern Church never received any of these Rules or Canons, *Kelw. Rep. 7 H. 8. fo. 184.*) the Bishop of Rome attempted also to draw the Laity by degrees into obedience to these Ordinances: and to that purpose, in the first place he propounds certain Rules or Ordinances for *Abstinence*, or days of Fasting, to be observed as well by the Laity as the Clergy, which were upon the first Institution thereof called by the mild and gentle name of *Rogationes*; as *Marsilius Par. lib. Defensor Pacis, par. 2. cap. 23.* hath observed; and thence, it seems, the Week of Abstinence, a little before the Feast of *Pentecost*, was called the *Rogation-week*, the time of Abstinence being appointed at the beginning by that Ordinance which was called *Rogatio*, and not *Pre-*

Pafch. 9 Jac.
C. B. en Ire-
land, en le
Case de Com-
menda, le
Roy vers. Cy-
prian Horse-
fall & Rob.
Wale. Davis
Rep.

ceptum

captum vel Statutum. Now when the Laity out of their Devotion had received and obeyed these Ordinances of *Abstinence*, then the Bishop of Rome proceeds farther (*De una presumptione ad aliam transiit Romanus Pontifex*, as *Marsil. Pat.* there says) and made many Rescripts and Orders *per Nomen Decretalium*, which were published in the year 1230. which was in the Fourteenth year of King *H. 3.* or thereabout. *Vid. Matth. Par. Hist. Mag.* 403. and these were made to bind all the Laity, and Sovereign Princes as well as their Subjects, in such things as concerned their Civil and Temporal Estates; As that no Lay-man should have the Donation of an Ecclesiastical Benefice: That no Lay-man should marry within certain Degrees, out of the Degrees limited by the *Levitical Law*: That all Infants born before Marriage, should be adjudged after Marriage *Legitimate*, and capable of Temporal Inheritance: That all Clerks should be exempt from the Secular power; and others of the like nature. But these *Decretals* being published, they were not entirely and absolutely received and obeyed in any part of Christendom, but onely in the Pope's Temporal Territory, which by the *Canonists* is called *Patria obedientia*. But on the other hand, many of those Canons were utterly rejected and disobeyed in *France* and *England*, and other Christian Realms, which are called *Patria Consuetudinaria*; As the Canon which prohibited the Donation of Benefices *per manum Laicam* was ever disobeyed in *England*, *France*, the Kingdom of *Naples*, and divers other Countries and Common-wealths; and the Canon, to make Infants *Legitimate* that were born before Marriage, was specially rejected in *England* when in the Parliament held at *Merton*, *omnes Comites & Barones una voce responderunt, Nolumus Leges Anglia mutari, que hucusque usitate sunt, &c.* And the Canon which exempts clerks from the Secular power was never fully observed in any part of Christendom. *Kelw. 7. H. 8. 181. b.* which is one infallible Argument, That these Ordinances had not their force by any Authority that the Court of *Rome* had to impose Laws on all Nations without their consent, but by the approbation of the people which received and used them. For by the same reason whereby they might reject one Canon, they might reject all the other. *Vid. Bodin. lib. 1. de Rep. cap. 8.* where he saith, That the Kings of *France*, on the erection of all Universities there, have declared in their Charters, that they would receive the Profession of the Civil, and Canons, to use them at their discretion, and not to be obliged by these Laws. But as to those Canons which have been received, accepted and used in any Christian Realm or Common-wealth, they by such acceptation and usage have obtained the force of Laws in such particular Realm or State, and are become part of the Ecclesiastical Laws of that Nation, and so those which

which have been embraced, allowed and used in *England*, are made by such allowance and usage, part of the Ecclesiastical Laws of *England*; By which the interpretation, dispensation or execution of these Canons, being become Laws of *England*, doth appertain sole to the King of *England*, and his Magistrates within his Dominions, and he and his Magistrates have the sole jurisdiction in such cases, and the Bishop of *Rome* hath nothing to doe in the interpretation, dispensation, or execution of those Laws in *England*, although they were first devised in the Court of *Rome*; No more than the chief Magistrate of *Athens* or *Lacedamon* might claim jurisdiction in the ancient City of *Rome*, for that the Laws of the XII. Tables were thither carried and imported from those Cities of *Greece*; and no more than the Master of *New-college* in *Oxford*, shall have Command or Jurisdiction in *King's-College* of *Cambridge*, for that the private Statutes whereby *King's-College* is governed, were, for the most part, borrowed and taken out of the Foundation-Book of *New-College* in *Oxford*: And by the same Reason the Emperour may claim jurisdiction in maritime causes within the Dominions of the King of *England*, for that we have now for a long time received and admitted the Imperial Law for the determination of such Causes. *Vid. Cavdries Case, Co. par. 5. and Keln. Rep. 184. a.* Now when the Bishop of *Rome* perceived that many of his Canons were received and used by divers Nations of Christendom, he under colour thereof claimed to have Ecclesiastical jurisdiction in every Realm and State where these Canons were received, and sent his Legates with several Commissions into divers Kingdoms, to hear and determine Causes according to these Canons: which Canons although neither the Pope nor his Ministers, at the first venting and uttering thereof, dared to call Laws, *Ne committerent crimen Læsæ Majestatis in Principes* (as *Marsil. Pat. lib. Defensor. Pacis pa. 2. ca. 23.* observes) who also says, That these Canons being made by the Pope, *Neque sunt humane Leges, neque divine, sed documenta quadam & Narrationes*; yet when he perceived that these Canons were received, allowed and used in part by several nations, he compiled them into Volumes and called them *Jus Canonicum*, and Ordained that they should be read and expounded in publick Schools and Universities, as the Imperial Law was read and expounded, and commanded that they should be observed and obeyed by all Christians on pain of Excommunication, and often endeavoured to put them in execution by coercive power, and assumed to himself the power of interpreting, abrogating and dispensing with those Laws in all the Realms of Christendom at his pleasure, so that the Canonists ascribe to him this prerogative, *Papa in omnibus jure positivo & in quibusdam ad jus divinum pertinentibus, dispensare potest, quia*

F f dici.

dicatur omnia iura habere in Scribis pectoris sui, quantum ad interpretationem & dispensationem, Lib. xi. de Const. cap. licet. About the time of An. 25 Ed. i. Simon a Monk of Walden began to read the Canon Law in the University of Cambridge, vid. Stow and Walsingham in that year. Also the Manusc. lib. 6. Decretal. in New College Library at Oxford hath this Inscription in the Front, Anno Domini 1298. which was in the year 26 Ed. i. 19. November. in Ecclesia Fratrum Prædicatorum Oxon. fuit facta publicatio lib. 6. Decretal. whereby it appears when it was that the Canon Law was introduced into England. But the jurisdiction which the Pope by colour thereof claimed in England was a mere Usurpation, to which the Kings of England from time to time made opposition, even to the time of King H. 8. And therefore the Ecclesiastical Law which ordained, That when a Man is created a Bishop all his inferiour Benefices shall be void, is often said in the Bishop of St. David's Case, in 11 H. 4. to be the ancient Law of England. And 29 Ed. 3. 44. a. in the Case of the Prebend of Osgate, it is said, That though the Constitution which ousts Pluralities began in the Court of Rome, yet a Church was adjudged void in the King's Bench for that cause or reason; whereby it appears, That after the said Constitution was received and allowed in England, it became the Law of England: Yet all the Ecclesiastical Laws of England were not derived from the Court of Rome; for long before the Canon Law was authorized and published in England (which was before the Norman Conquest) the ancient Kings of England, viz. Edgar, Athelstan, Alfred, Edward the Confessor, and others, have with the advice of their Clergy within the Realm, made divers Ordinances for the government of the Church of England; and after the Conquest, divers Provincial Synods have been held, and many Constitutions have been made in both Realms of England and Ireland; all which are part of our Ecclesiastical Laws at this day. Vid. Le Charter de William le Conqueror. Dat. Ann. Dom. 1066. irrot. 2 R. 2. among the Charters in Archiv. Turris Lond. pro Decano & Capitulo Lincoln. Willielmus, Dei gratia, Rex Anglorum, &c. Scitis, &c. Quod Episcopales Leges que non bene, nec secundum Sanctorum Canonum precepta, usque ad mea tempora in Regno Angliæ fuerunt, Communi Concilio Episcoporum meorum, & ceterorum Episcoporum, & omnium Principum Regni mei emendandas judicavi, &c. See also Giral. Cambrenf. lib. 2. cap. 34. in the time of King H. 2. a Synod of the Clergy of Ireland was held at the Castle, wherein it was ordained, Quod omnia divina, juxta quod Anglicana observat Ecclesia, in omnibus partibus Hybernix amodo tractentur. Dignum enim & justissimum est, ut sicut Dominum & Regem ex Anglia divinitus sortita est Hybernia, sic etiam exinde vivendi formam accipiant meliorem. But the distinction of Ecclesiastical or

Spiri-

Spiritual Causes from *Civil* and *Temporal* Causes, in point of jurisdiction, was not known or heard of in the Christian World for the space of 300 years after Christ; For the causes of *Testaments*, of *Matrimony*, of *Basfardy* and *Adultery*, and the rest, which are called *Ecclesiastical* or *Spiritual* Causes, were merely *Civil*, and determined by the Rules of the *Civil Law*, and subject onely to the jurisdiction of the *Civil Magistrate*; But after the *Emperours* had received the *Christian Faith*, out of a zeal they had to honour the learned and godly *Bishops* of that time, they singled out certain special causes, wherein they granted jurisdiction unto the *Bishops*, viz. in Causes of *Tithes*, because they were paid to men of the Church, in Causes of *Matrimony*, because Marriages were for the most part solemnized in the Church; in Causes *Testamentary*, because Testaments were many times made *in extremis*, when Church-men were present, giving *Spiritual* comfort to the Testator, and therefore were thought fittest persons to take the Probats of such Testaments. Howbeit these *Bishops* did not then proceed in these Causes according to the Canons and Decrees of the Church (for the *Canon Law* was not then known) but according to the Rules of the *Imperial Law*, as the *Civil Magistrate* did proceed in other Causes; so that the Primitive jurisdiction in all these Causes was in the *Supreme Civil Magistrate*, and though it be now derived from him, yet it still remaineth in him as in the Fountain.

The Case of
Præmunire
in Davis Rep.
fo. 97.

Of Churches, Chapels and Church-yards.

1. Ecclesia; what that word imports; the several kinds thereof.
2. Possessions of the Church protected by the Statute-Laws for Alienation; the care of the Emperour Justinian in that point.
3. To whom the Soil and Freehold of the Church and Church-yard belong, to whom the use of the Body of the Church, to whom the disposal of the Pews and Seats, and charges of repairs.
4. The Common Law touching the Reparation of Churches, and the disposal of the Seats therein.
5. The same Law touching Isles, Pictures, Coats of Arms, and Burials in Churches; also of Assaults in Churches and Church-yards.
6. The penalty of quarrelling, chiding, brawling, striking or drawing a weapon in the Church or Church-yard.
7. Where Prescription to a Seat in a Church is alledged, the Common Law claims the cognizance thereof.
8. The Immunities anciently of the Church-Sanctuary, as also of Abjurament now abrogated and taken away by Statute.
9. The defacing of Tombs, Sepulchres or Monuments in Churches, punishable at the Common Law; also of Right to Pews and Seats in the Church.
10. The Cognizance of Church-reparations belongs to the Ecclesiastical Court.
11. A Prohibition upon a surmise of a custome or usage for Contribution to repair a Church.
12. Church-wardens are a Corporation for the Benefit, not for the Prejudice of the Church.
13. Inheritance cannot be charged with a Tax for Repairs of the Church, nor may a perpetual charge be imposed upon Land for the same.
14. When the use of the Church-Books for Christnings first began.
15. Chapel; the several kinds thereof; The Canonists conceits touching the derivation of that word.
16. Where two Parochial Churches are united, the charge of reparations shall be several as before.
17. The Emperour Justinian's Law Provisional, touching the building of new Chapels.
18. Whether a Seat in the Church, and priority in that Seat claimed by Prescription, be triable at the Common Law by Action upon the Case.

19. *A Case in Law touching a Tax made in a Parish for making of new Bells for the Church.*
20. *Whether a Tax for Repairs of the Church may be made by the Church wardens alone, without the major part of the Inhabitants.*
21. *Church-Seats in the generality are in the Ordinaries power to dispose.*
22. *Divers other Cases at the Common Law, pertinent to the subject of the Premises.*
23. *In what respects an Inhabitant in one Parish, having Land in another, may or may not be taxed, as to the Church of that Parish where the Land lies.*
24. *The difference in Law between a Parson's grant to a man his own Tithes, and his grant to him the Tithes of another man, as to the validity of the Grant.*
25. *Disposal of Seats in the Body of a Church belongs of common right to the Ordinary of the Diocese.*
26. *In what respect a man inhabiting in one Parish, shall be charged towards the Reparation of the Church of another, where he hath Land, and in what respects not so.*
27. *Rates for Reparation of Churches are cognizable onely in the Ecclesiastical Court, and no Prohibition, notwithstanding any inequality in the Rate.*
28. *Repairers of a Chapel of Ease, not discharged thereby of Reparations of the Mother-Church.*
29. *Land in a Parish not to be rated for the Ornaments of a Church. That Rate to be according to the personal Estate.*
30. *In what case a Prohibition lies to a Suit for Reparations of a Church; not so, as to a Rate made by the major part of the Parishioners for the Ornaments of the Church.*
31. *The Bounds of a Parish not triable in the Ecclesiastical Court, though the difference be between two Spiritual persons.*
32. *Prohibition, where a Vicar sued the Parson impropriate for Damages, for cutting down the Trees growing in the Church-yard.*
33. *Prescription of repairing a Chapel of Ease, no discharge from repairing the Mother-Church.*
34. *The charge of repairing a Church refers to Land; of providing Ornaments of the Church, to the personal Estate; and how to be apportioned between Landlord and Tenant.*
35. *Action of Trespass lies for the Heir of such, whose Coat-Armon or Monument in Church or Church-yard, is by any defaced or demolished, be it by the Parson, the Ordinary, or by any other.*
36. *A Case in Law touching a disturbance of sitting in certain Seats in a Chancel of a Church.*

37. *Certain Cases in Law touching striking in a Church and Church-yard, and drawing a weapon in the same.*
38. *The difference taken between having a Seat in the Isle of a Church, and a Seat in the Body of the Church.*
39. *A Prohibition denied on a Prescription of not Repairing a Mother-Church, in regard such Prescription is merely Spiritual.*
40. *The Ecclesiastical Court not to intermeddle with the Precincts of Parish Churches.*
41. *Towards Church-Reparation, all Lands within the Parish, as well of Foreigners as Parishioners, are ratably liable.*
42. *Controversies touching Seats in Churches, determinable in the Spiritual, not Temporal Courts; In what Cases the Common Law hath took cognizance thereof.*

(1.) **CHURCH** [*Ecclesia*] *ἐκκλησία*, from the old word *καθ*, *h. e.* τὸ καθῶ, or rather *παρὰ τὸ ἐκκαλεῖν*, *h. v.* *evocare*, being an Assembly of men gathered out of all Mankind; or *evocatus per Evangelium*; or from the Hebrew [*Cahal*] *h. s.* *Congregatio*; the true visible Church being a Congregation of Faithfull men, in which the pure Word of God is preached, and the Sacraments duly ministred according to *Christ's* Institution, in all things necessary to the same. This in a *Theological* sense; but the word [*Church*] in a *Legal* sense, as here chiefly intended, differs from the former as far as *Dead Walls* do from *Living Saints*; there being no more here designed to be touch'd at, than what refers rather to the place than to the persons. Churches are of three sorts, Cathedral, Collegiate, Parochial. The Bishop is the Incumbent of the first: Priors and Abbats were, and Heads of Colleges are, Incumbents of the second: and Parsons of the third; commonly called a *Rectory*, being either a Parsonage or a Vicarage. And that either (1.) *Ratione dotationis*. (2.) *Fundationis*. (3.) *Fundi*.

* Auth. Coll.
2, & 9. and
Coll. 5.

* 1 Jac. c. 3.

(2.) The Emperour *Justinian* decreed, That the Lands of the Church should not be sold, alienated or exchanged unless it were to the Prince's house or to or with another like religious place, and that in equal Goodness and quantity, or that it were for the redemption of Captives^a. But by the *Statute of primo Jac.* the Possessions of the Church are protected from alienation or diminution in all respects, and so as that they may remain and continue according to the true intent of their Foundation, to their Successours for ever, to the uses and purposes therein limited^b.

(3) By the Common Law, the Church and Church-yard are it seems the Soyl and Freehold of the Parson; but the use of the Body of the Church, and the Repairs and Maintenance thereof is common to all the Parishioners; albeit the disposal of the Pews in

in the Body of the Church, or an Isle or Chapel joyning to the Body, and the disposing of the charges of the Repairs thereof, belong to the Ordinary; insomuch that no man can challenge a seat in the Body of the Church without shewing some special reason for the same. All which appears in the Case of *Boorby* against *Baily*, where *Boorby* being Executour of *Gilbert* brought a Prohibition against *Baily*, and his surmize was, That whereas *Sir Bernard Whetston* was seized of the Manour of *Woodford-Hall*, and that he and those whose Estate he hath in the same, had used time out of mind, to have a peculiar Pew in the Body of the Church, and that the Defendant by Suit in the Ecclesiastical Court, sought to dispossess them of the same. And by the opinion of the whole Court, this was no sufficient ground of a Prohibition; for though the Church and Church-yard be in the Law the Soyl and Freehold of the Parson, yet the use of the Body of the Church, and the repair and maintenance thereof is common to all the Parishioners. And for avoiding of confusion, distribution and disposing of Seats and charges of Repair belong to the Ordinary, and therefore no man can challenge a peculiar Seat without a special reason. But if it had been Prescribed, That *Sir Bernard Whetston, &c.* had used time out of mind at their own costs to maintain that Pew, and had therefore had the sole use thereof, the Prescription might have stood and been warrant for a Prohibition, though the Pew were in the Body of the Church. And so it is in the like case of an Isle or Chapel adjoining to the Body of the Church upon the same difference, whether it hath been maintained by the whole Parish, or by some particular persons, like unto the Reasons of a Chapel of Ease.

(4) Touching the Reparation of Churches, it hath been ruled, That he who hath Land in a Parish, though he doth not inhabit there, shall yet be chargeable to the Reparation of the Parish Church, but not to the buying of the Ornaments of that Church, for that shall be levied of the Goods of the Parishioners, and not of their Lands, by *Sir Hen. Tolverton*, and said to be so formerly adjudged^d. And it hath been holden, That if two Churches Parochial be united, the Reparation shall be several as before^e. And although the Lord of a Manour may prescribe to a certain Seat or Pew in the Church, by having time out of mind maintained, and repair'd the same at the proper costs of himself and Ancestours, yet as to the Common Seats of the Church it is otherwise in respect of the Common Parishioners: As in the Case of *Harris* against *Wise-man*, against whom *Harris* had procured a Prohibition, *Wise-man* having Libelled in the Ecclesiastical Court against him for a Seat in the Church, which did belong to his House; and it was said by *Chapel. Hobbs* and *Winch* onely present, That a man, or a Lord of a Ma-

In *Eaton's*
Case against
Ayliffe it was
said by *Hut-*
ton, That
Seats in the
generality are
in the power of
the Ordinary
to dispose.
Hetley's Rep.

Case *Boorby*
by vers. *Baily*.
Hob. Rep.

Parochiarum
prima distri-
butio fit per
Theodorum
Cantuarien-
sem. An. 663.
Spelm. To. 1.
in Concil. He-
refordens.

^d Mich. 19
Jac. Rot. 1791.
Case *Dodde-*
ridge vers.
Anthony.

Winch. Rep.
The Parish
of *Ashen's*
Case vers. *Ca-*
ste-Birmidge.
Chapel. *Hobbs.*

non.

nor, who had an Ile or a Seat in the Church, &c. and he sued for that in the Spiritual Court, he shall have a Prohibition; but not every common Parishioner for every common Seat: yet in that case a *Superfedens* was granted to stay the Prohibition^f. It hath also been held, that the Grant of a Seat in a Church to one and his Heirs is not good; for the Case of *Brabin* and *Tradum* was, That the Church-wardens of *D.* had used time out of mind to dispose and order all the Seats of the Church, whereupon they disposed of a Seat to one, and the Ordinary granted the same Seat to another and his Heirs, and excommunicated all others, who afterwards should sit in the Seat, and a Prohibition was prayed and granted, for this Grant of a Seat to one and his Heirs is not good, for the Seat doth not belong to the Person but to the House, for otherwise when the person goes out of Town to dwell in another place, yet he shall retain the Seat, which is no reason, and also it is no reason to excommunicate all others that should sit there, for such great punishments should not be imposed upon such small Offenders, an Excommunication being *Traditio diabolica* &c.

^g Pasch. 16
Jac. B. R.
Brabin and
Tradum's
Case, Poph.
Rep.

(5.) In the Case of *Day* against *Beddington* and others, upon a Cross-bill between the parties, for pulling down of painted Glass, Pictures and Arms, in a Window in an Ile of a Chapel in the Parish of *Wellington* in *Somerset*, these points in the Case were resolved: (1.) If an Inhabitant there and his Ancestours time out of mind, &c. have used to repair an Ile in a Church, and to sit there with his Family, &c. and to bury there, that makes that Ile proper and peculiar for his Family; otherwise if he had not used to repair it at his own costs, but with the charge of the Parish; then the Ordinary may appoint who shall sit there from time to time, notwithstanding a use to sit there, onely, to the contrary. (2.) If any superstitious Pictures are in a Window of a Church, or Ile, &c. it is not lawfull for any to break them, &c. without License of the Ordinary; and if any does to the contrary, he shall bind him to his good Behaviour. And so it was in *Prickett's* Case. (3.) That the Ordinary or Church-warden cannot license a Parishioner to bury within the Church: But it ought to be licensed by the Parson for the Franktenement is in him onely. (4.) If Coats of Arms are put in a Window, or upon a Monument in the Church or Church-yard, they may not be broken by the Ordinary, Parson or Church-wardens or any other; for the Heir shall have his Action upon the Case for that, 9 *Ed.* 4. 14. for they belong to him, 30 *Ed.* 3. 9. b. c. (5.) If one be assaulted in the Church, or within a Church-yard he may not beat the other, or draw a Weapon (although it be in his own defence) there; for it is a sanctified place, and he may be punished for that by 2 *Ed.* 6. And so if in any of the King's Courts, or

or within view of the Courts of Justice; because a Force in that case is not justifiable, though in his own defence^b.

(6.) For the penalty of striking or drawing a weapon in the Church or Church-yard. *Vid. Stat. 5 Ed. 6. cap. 4.* whereby it is enacted, That if any person shall by words onely quarrel, chide or brawl in any Church or Church-yard, it shall be lawfull for the Ordinary of the place, upon proof by two Witnesses, to suspend the Lay-Offender *ab ingressu Ecclesie*, and the Clerk-Offender from the ministration of his Office, for such time as to the said Ordinary shall seem meet: And if any one shall smite or lay violent hands upon another in any Church or Church-yard, in that case *ipso facto* the Offender shall be deemed Excommunicate. But and if any person shall maliciously strike another with any weapon in any Church or Church-yard; or to the intent of striking another with the same, shall but draw a weapon in any Church or Church-yard; the Offender being thereof duly convicted, shall lose one of his Ears, if he hath any, or in one of his Cheeks with a hot Iron be burnt and mark'd with the Letter F. in case he hath no Ears, and besides shall stand *ipso facto* Excommunicatedⁱ. Upon this Statute there was an Indictment against *Jasper Colmley and John Colmley of Huxton* in the County of *Middlesex*; for that they *Insultum fecerunt* upon *John Higham Dr. of Physick, in Ecclesia de Shoreditch predicta; Et predict. Joh. Higham ad tunc, &c. ibidem in Ecclesia predict. de Shoreditch, verberaverunt, vulneraverunt, & male traſſaverunt contra formam Statuti, &c.* Upon this the Grand Jury find *Billa vera* quoad *Jasper Colmley*, and *Ignoramus* for *John Colmley*; And thereupon he appeared and pleaded *Not guilty*, and found against him. *Rolls* now moved in an Arrest of Judgment, That the Indictment was not good, being *Fecerunt*, whereas it is found onely *Billa vera* against one. *Sed non allocatur*, because it was exhibited against Two, and it is but false Latin. Secondly, because the Indictment is *contra formam Statuti*, and this Offence is not punishable by the Statute, unless that he smote with a weapon, or drew a weapon in the Church or Church-yard, or drew a weapon to that intent, which is not mentioned in the Indictment: And by the Second clause in the Statute, For smiting or laying violent hands it is Excommunication *ipso facto*: and it is not mentioned here how he struck, and thereof the Justices doubted. But *Jones* said, That the Indictment is good for Battery at the Common Law. But all the other Justices were against him therein; for the Indictment concluding *contra formam Statuti*, it cannot be good as for an offence at the Common Law. But afterwards another Exception was taken by *Grimston*. because the Offence was alledged to be done in the Church of *Shoreditch* aforesaid, and *Shoreditch* was not named

^b Case Day
vers. Bedding-
ton and o-
thers. Noy's
Rep.

Co. lib. 6. fo.
26. b. Green's
Case. int. Leg.
Ina. Tem-
plo pugnave-
rit, 120 Soli-
du noxiā fa-
cito.
Dyer. 23 E-
liz. 177. Case
ult.
ⁱ Stat. 5 Ed.
6. c. 4.

¹ Trin. 12
Car. B. R.
Cholmley's
Case. Cro.
Rep. 3.

before: And upon view of the Indictment, it appearing to be so, all the Court held, that the Indictment was void: And for this cause the Defendant was discharged ^k. In the Ecclesiastical Laws of Ina, King of the West-Saxons, cap. 6. *Qui in Templo pugnaverit, 120 Solidis noxiam Sarcito.* Ibid. *Aliud exemp. cap. 6. Si quis in Ecclesia pugnet, centum viginti Sol. emendet, &c. [& alios 60 s. emendet pro vita.]* Also among the Ecclesiastical Laws of Hoel Dhu King of Wales, l. 10. *De pugna que in Cameterio agitur, 14 Libra sunt reddenda.* Likewise in l. 1. LL. Eccles. Edovardi Sen. R. Anglia, & Guthurni R. Danorum in Easr-Anglia. *Hoc primo decreverunt, ut Ecclesia pax intra suos parietes inviolate servetur.* And in cap. 2, & 3. LL. Eccl. Canuti Regis, *valde rectum est, ut Ecclesia pax intra parietes suos semper inconconvulsa permaneat; quicunque eam perfergit, de vita & omnibus in misericordia Regis sit. Et si quis pacem Ecclesie Dei violabit, ut intra parietes ejus homicidium, hoc inemendabile sit, &c. nisi Rex ei vitam concedat.*

¹ Carleton
vers. Hutton.
Noy Rep. &
Latch. Rep.

(7.) Where Prescription is alledged for Right to a Seat in a Church, or for Priority in that Seat, the Common Law hath took cognizance thereof, as in the case of *Carleton* against *Hutton*, where C. claimed the upper place in a Seat in the Church, and H. disturb'd him in a violent manner; and the Bishop of the Diocese sent an Inhibition to C. untill the matter were determined before him. And by the Court a Prohibition was awarded; because it does not belong (*as Reported*) to the Spiritual Court: And as well the Priority in the Seat, as the Seat it self may be claimed by Prescription: and an Action upon the Case lies for it at Common Law, *Ve. Litt.* 121, 122 ^l. The Ordinary hath in him the right of distribution of the Seats in a Church, yet so as that prescription shall take place, whether it refers to the right of any particular Parishioner, or to the power of the Church-wardens. The Case was, G brought an Action of Trespass for the breaking of his Seat in the Church, and cutting of the Timber in small pieces, and carrying them away, &c. The Defendant pleads in Bar, That they were the Church-wardens: and that the Plaintiff had erected that Seat without the License of the Ordinary, and it was an hindrance to the Parishioners, &c. and that they as Church-wardens the said Seat, &c. the which is the same Trespass. The Plaintiff demurs, and Judgment for him: For admitting that the Church-wardens may remove a Seat in the Church at their pleasure, yet they cannot cut the Timber of the Pew, And thereupon they confessed the Trespass. *Ve.* 6 E. 4. 7. 9 E. 4. 14. 8 E. 4. 6. 18 E. 4. 18. 21 H. 7. 21. 12 H. 7. 27. 11 H. 4. 12 ^m. Where there is a Parson Impropriate, he hath the best right to the chief Seat in the Chancel, as was resolved in *Sir William Hall's* Case against *Ellis*, where E. Farmor of a Rectory Impropriate Libels

ⁿ Case W.
Gilson vers.
Wright & al-
os. Noy Rep.

in the Ecclesiastical Court *pro Sedile in dextra parte Cancellæ*, and in his Additional Libel he Libels, *pro loco primo*, and principally in *dextra parte Cancellæ*. The Defendant there surmizes to have a Prohibition, *Quod est antiqua Parochia & antiqua Cancellæ*: and that he is seized of an ancient Messuage in that Parish, and that he and all those, &c. have used to sit in *dextra parte Cancellæ prædictæ* to hear, &c. And it was Resolved by the Court, that of common right, the Parson Improprite, and *per Consequent*, his Farmor ought to have the chief Seat in the Chancel; because he ought to repair it: But by Prescription another Parishioner may have it. But in this case a Consultation was awarded, with a *quoad*, &c. because the Libel and the Additional that now is all one, is *pro primo loco*, &c. and the surmise is onely *pro Sedile in dextra parte*, and not *pro loco primo* in it ⁿ.

(8.) The Church in construction of Law, is *Domus mansionalis Omnipotentis Dei*, and therefore it is Burglary for a man to break and enter a Church in the night, of intent to steal, &c. ^o. And so sacred is the Church or Church yard reputed in Law, that Ecclesiastical persons, whilst they are doing any Divine Service in either of them, or in any other place dedicated to God, may not be Arrested ^p. Yea anciently the Church and Church-yard was a Sanctuary, and the foundation of Abjuration; for whoever was not capable of this Sanctuary, could not have the benefit of Abjuration; and therefore he that committed Sacrilege could not abjure, because he could not take the Privilege of Sanctuary ^q. This Abjuration was, when one having committed Felony, fled for safeguard of his life to the Sanctuary of a Church or Church-yard, and there before the Coroner of that place within 40 days confessed the Felony, and took an Oath for his perpetual Banishment out of the Realm into a Foreign (not Infidel) Countrey, chusing rather *perdere Patriam quam Vitam* ^r. But this Abjuration founded upon the Privilege of Sanctuary is wholly abrogated and taken away by an Act made 21 Jac. Reg. whereby it is Enacted, That no Sanctuary or privilege of Sanctuary should be admitted or allowed in any case ^f. And here Note, That this kind of Abjuration hath no relation to that of Recusants by force of the Stat. of 35 Eliz. cap. 1. because such Abjuration hath no dependency upon any Sanctuary ^t. But as to the other Abjuration in relation to Felonies, Sacrilege excepted, (no Abjuration or Sanctuary being allowed in cases of Treason or Petit Treason) the Law was so favourable for the Preservation of Sanctuary in the Church or Church-yard, That if a Prisoner for Felony had before his attainder or conviction escaped and taken Sanctuary, and being pursued by his Keepers or others, were brought back again to the Prison, he might upon his Arraignment have pleaded the same, and should have

^a Tr. 7 Jac. B. R. Sir W. Hall vers. El. lx. Noy Rep. ^o Co. Inst. p. 3. c. 14. Bric. fo. 17. Dyer. 1 Mar. 99. 22 E. 3. tit. Cor. 264. 22 Aff. 26 Aff. 19. ^p 50 E. 3. 5. P. Arrests 1. Vid. St. 1 R. 2. c. 15. Dalt. Ju. c. 68. By the Ecclesiastical Laws of Ina. K. of the W. Saxons, c. 5. *Si quis rei capitalis rem ad Templum confugerit vitator.* ^q 8 E. 2. cor. 420. *Si quis sit mortis reus, & ad Ecclesiam confugiat, vitam habeat. In alio Exemplari LL. Eccles. Ina. cap. 5. Cust. de Norm. c. 24. & 8. Inter Leges Ina. c. 5. & Int. Leg. Canuti, fo. 205. c. 3. & Co. Inst. p. 3. cap. 51. ^r 11 Jac. in the continuance of Statutes, &c. Co. ubi supra. ^t Co. ib. ubi vid. plene de Abj. & Sanct.*

been restored again to the Sanctuary of the Church or Church-yard.

v Lib. Inr. 532. b. Sanct. 2. Hil. 43 E. 3. Rot. 115. Buck. W. Atwell's Case. Co. Inst. p. 3. cap. 101. 9 E. 4. 14. the Lady Wiche's Case. & Mich. 10 Jac. C. B. Corvin vers. Pym. Co. Inst. par. 3. ca. 97. *Adio datur, si quis arma in aliquo loco posita delevit seu abrajit, &c.* Caſtan Con- cil. 29. 2 Mic. 10 Jac. C. B. dict. Ca. inter Corven & Pym.

(9.) The defacing of Tombs, Sepulchres or Monuments erected in any Church, Chancel, Common Chapel or Church-yard, is (it seems) punishable by the Common Law; and for which the Erectours or Builders thereof during their lives, and after their decease their Heirs shall have the Action. But the Erecting thereof ought not to be the hindrance of Divine Service. And albeit the Freehold of the Church is in the Parson, yet if the Lord of a Manour, or any other that hath an House within the Town or Parish, and he and all those whose Estate he hath in the Mansion-house of the Manour, or other House, hath had a Seat in an Isle of the Church, for him and his Family onely, and have repaired it at his own proper charges, it shall be intended that some of his Ancestours, or of the parties whose Estate he hath, did build and erect that Isle for him and his Family onely; and therefore if the Ordinary endeavour to remove him, or place any other there, a Prohibition (as was resolved in *Corven's Case*) will lie. It hath also been farther Resolved, That if any man hath a House in a Town or Parish, and that he and those whose Estate he hath in the House, hath had time out of mind a certain Pew or Seat in the Church, maintained by him and them, the Ordinary may not remove him (for *Prescription*, according to Sir *Ed. Coke*, maketh *Certainty*, the Mother of *Quietness*) otherwise a Prohibition will also lie in the case. But where there is no *Prescription*, there the Ordinary for avoiding of contention in the Church, may place the Parishioners in the Church or publick Chapel according to their qualities and degrees. And until the Bishop hath consecrated or dedicated Churches or publick Chapels new erected, the Law doth not take knowledge of them *qua tales*; for which reason it is, That a Church or not a Church; a Chapel or not a Chapel; is tried or certified by the Bishop.

8 H. 7. 12. a. per *Hussy* accord. Pasch. 10 Jac. Cam. Stel. inter *Hussy* and *Layton*. Refol. per le Court. Co. Inst. par. 3. cap. 97. 8 H. 7. 12. a. acc. 12 H. 2. 12. per *Hussy*. Co. ubi supr. 8 H. 6. 32. 37.

(10.) Touching the Reparation of Churches, the cognizance thereof appertains to the Ecclesiastical Court, as was agreed by the Court in *Buck's Case* against *Ancotts*, where in a Prohibition the Defendant said, That in *Hernechurch* in *Essex* are Chapels of Ease, viz. *Rumford* and *Haveringe* Chapels, and that they of *Haveringe* have used time out of mind, &c. to contribute to the Reparation of *Rumford*: and that in the time of *H. 4. virtute Literar. Patent. & concurrentibus iis, &c.* And *Rumford* was pulled down, and erected in a more convenient place within this precinct and circuit, viz. twenty eight foot longer and fifteen foot broader. Noy, that it does not lie. (1.) *Virtute Literar. Patent.* in general is not good. But the Patent ought to have been shewn *in hac verba*,

verba, or produc'd in Court; by which the Court might judge: For a new Church cannot be erected without Letters Patents, because it is a Sanctuary, *Ve. 5 E. 3. 26. 1 H. 7. 25. & 22 E. 4.* the Lord *Lisle's Case*. (2.) The Prescription is gone, by the erecting in another place, and longer, &c. as aforesaid, *ve. 4. Rep. P. 6.* And that shall be taken strict, *Perkins 761. 7 E. 4. 27. 10 E. 3. 23.* But the Court was on the contrary, because it is *pro bono publico*, and in such a case a Pleader, by *Concurrentibus iis*, is good. As in an Union, *11 H. 7. 8.* And that the cognizance for Reparation of the Church, appertains to the Spiritual Court; and it is not like the Case of a Tenure, *4. Rep. 86.* because the Tenant by that is put to a greater charge, and no profit or benefit accrues to the Tenant, as it does to the Parishioner. And *Easter Term* ensuing, a Consultation was granted by the Court^b. He that hath the Impropriation of a Rectory or Parsonage, ought to repair the Chancel, and so he ought to contribute to the reparation of the Church, if he hath any Land in that Village. *Mich. 18 Jac. B. R. Serjeant Davies Case. Roll, Rep. par. 2.*

^b Hill. 5 Jac.
B. R. Buck
against Am-
cotts. Noy
Rep.

(11.) The Church-wardens of *Denford*, an Ancient Church in the County of *Northampton*, sue the Inhabitants of *Kingshead* in the same Parish, where there was a Chapel of Ease, for Contribution to repair the Church of *Denford*. And they pray a Prohibition upon suggestion, That time out of mind, &c. they have used to repair their own Chapel, and onely a part of the Wall of the Church-yard of the said Church of *Denford*. And it seemed by the better opinion of the Court, that it was not good. For their Ease shall not be a disease to the rest of the Parishioners. For *Popham* said, That the Assent is not requisite to build a Chapel of Ease, and then the Ordinary and the Parson cannot charge the Parishioners with greater Charge. By *Yelverton*, That the Parson ought to repair the Wall of the Church-yard. But by *Fenner*, the Parishioners in the Spiritual Court shall be compelled to doe it, although that the Frank-tenement be in the Parson. *Yelverton* objected; and by *Kemp* Secondary, that the Parishioners of repair the Wall of the Church-yard. Yet now it was ordered, that Prohibition shall be granted, and the Defendants if they please may demurr upon it. Note also *B. 5. Jac. B. R. a Derbyshire Case*, where a Prohibition in such case was denied^c.

(12.) Two Church-wardens sue *S.* for Reparation of the Church according to the Tax asselt. *S.* pleads he always offered to pay. By which the Sentence in the Ecclesiastical Court passed against them. Then they Appeal, and Sentence is repealed, and 15*l.* costs given to them, and they sue for that 15*l.* in the Ecclesiastical Court. *S.* pleads a Release of one of the Church-wardens. And in a Prohibition

^c Pasc. 4 Jac.
Eliz. The
Church-war-
dens of Den-
ford's Case.
Noy Rep.

bition it seem'd to the three Justices, That that Release is a Bar against the other, and that if it be disallowed in the Spiritual Court, by the Court it was said a Prohibition shall lie. 7 Jac. B. R. rot. 852. A Consultation in such case was granted, for the Church-wardens in such a Case are a Corporation for the benefit, but not for the prejudice of the Parish. 13 H. 7. 9. 11 H. 4. 12. And they shall recover the Costs to the use of the Church, and the Release shall be well enough determined there where the Suit was commenced ^d.

^a Gore verfi.
Stak.
Noy Rep.

(13.) In *Heal's* Case against the Church-wardens of *Hobleton*, it was agreed by the Court, That for a Tax asselt for the Reparation of a Church a Rate made *perpetuis duratura temporibus*, it is not good to bind the Inheritance; but yet it is good by way of direction, how and how much shall be levied as need requires ^e. And in *Chamber's* Case a Prohibition was awarded to the Court of the Bishop of *Oxford*; for that, that *Chambers* was sued there for a perpetual charge imposed upon his Land, for the Reparation of the Church. For by the Court, an Inheritance cannot be charged with that ^f.

^z Case *Heal's*
verfi. Church-
wardens of
Hobleton.
Noy Rep.
^g *Chamber's*
Case.
Noy Rep.

In another Case one that was sued in the Ecclesiastical Court for Rates to reparation of the Church, alledged that they had over-valued his Land, Rating them at the value of 100 *l. per annum*, they being worth but 60 *l.* (2.) He alledged a Custome in the Parish, that they ought to be rated not according to the value of their Farms and Houses, but onely according to the value of their *Sheep-walks*; on that matter he prayed a Prohibition. As to the first, all the Court (except *Whitlock*) Resolved, that it is not material, because the Rates ought to follow the value of the Land, and for that the valuing of the Land properly belongs to them. As to the second, *Noy* moved, That although the Principal be a thing Spiritual, yet it is now mixt with a Custome, as in the Case *de modo deci-*
Mich. 22 Ja. *mandi* the Ecclesiastical Court is ousted of his Jurisdiction. *Hough-*
B. R. *Holland* *ton* Justice, It seems so as to other things; but the Church being
ver. *Kirton*.
Roll. Rep. the House of God, is more to be regarded, and a custome in pre-
judice to the Reparations of the Church, is void; for of common Right the House and all Lands are chargeable to the Reparations. And the Court commanded him to make a Suggestion of the Custome, omitting the value, and then they would consider, whether a Prohibition should go or no.

Cro. par. 1.

In *Steevenfon's* Case it was resolved, that if one hath Lands in one Town, and doth inhabit in another; he shall be compelled to be contributory to the Reparation of the Parish-Church where the Lands are.

(14.) Note, by *Coke* Chief Justice, That the keeping of a Church-Book for the Age of those that should be Born and Christ-
ned

ned in the Parish, began in the Thirtieth year of Henry the Eighth, by the Instigation of the Lord Cromwell.

(15.) Chapel, Capella, of the French [*Chapellee*, that is, *adicula*.] ^{8 Tyrwhite ver. Kynaston. Vid. Noy Rep. post dict. Ca.} Of this there seems to be three sorts; the one such as adjoins to the Church, as parcel of the same built by persons of honour, *ut ibidem Familiaria Sepulchra sibi constituent*; Another, that which is separate from the Mother-Church in a Parish of a large extent, built for the better ease and convenience of such Parishioners whose habitations are remote and far distant from the Parish-Church, and thence vulgarly called a *Chapel of Ease*, being served by some inferior Curate at the Charge either of the Rector, or of such as for whose convenience it is, according to the custome or composition. A *Chapel of Ease* is where there is a Parochial Church in the same Parish; wherein the Sacraments are administered, and not in the Chapel. 8 H. 6. 32. which appertains to the Parochial Church, and the Parson thereof. *Ibid.* And a Parochial Church cannot be a Chapel, 8 H. 6. 37. The Third is that which is called a *Free-Chapel*, which in point of Maintenance and Endowment, as also in respect of exemption from the Ordinaries Jurisdiction, seems to differ from both the former, and hath perpetual Maintenance towards the upholding thereof, by a charitable endowment thereof, without the Charge of the Rector or Parish.^b So that a *Free-Chapel* or *Libera* ^{37 H. 8. c. 4. Ed. 6. c. 14.} *Capella* is, according to the opinion of some, no other than a Chapel founded within some Parochial Precincts for Divine Service, by the bounty of some well disposed person (over and above the Mother-Church) to which it was at the Parishioners choice or liberty (for whose convenience it was erected) to repair or not, and endowed with Maintenance by the Founder, and therefore called *Free*. Notwithstanding which others are of opinion, and that more probable, That these onely are *Free-Chapels*, which are of the Foundation of Kings, and by them exempted from the jurisdiction of the Ordinary; but the King may also license a Subject to Found such a Chapel, and by his Charter exempt it from the Visitation of the Ordinary; in respect of which exemption, and from the jurisdiction of the Diocesan, it appears by the *Register of Writs* to be called *Free*.¹ H. 8 E. 3. B. R. Rot. 97. *Episcopus Exon. Attachiatus ad respondendum Domino Regi quare exercebat Jurisdictionem in Capella Regia Sancta Buriane in Cornub. &c.*^k The King himself visits his *Free Chapels* and Hospitals, and not the Ordinary.¹ The Lord Chancellor executes it for the King. These Chapels were all of them, together with *Chamtries* given to the King.^m Of this kind is the *Free Chapel of St. Martin le Grand*.ⁿ The Canonists are not agreed touching the derivation of this word; some take it (*à capiendi Laicos*,) others (*à Capra*,) because they conceive that they resemble

^{8 Tyrwhite ver. Kynaston. Vid. Noy Rep. post dict. Ca.}

^{b 37 H. 8. c. 4. Ed. 6. c. 14. If the King grant a Free Chapel to one, he ought to be put into possession by the Sheriff.}

^{14 H. 4. 11. b. and Rot. Abr. verb. Presentment, lit. B. p. 355.}

^{1 Register of Writs, f. 40, 41.}

^{k Ibid. & T. 17 E. 1. Rot. 97. B. R.}

^{1 Davin 1. Proxies 4. 27. E. 3. 85. F.}

^{n N. B. 42. 1 E. 6. c. 14.}

^{3 Ed 4 c. 4.}

resemble those Cottages which were wont to be covered over with Goat-skins. Others (*à cappa Divi Martini.*) Others (*è Chapellee, Gallic.*) °.

° *Rebuff. de pacif. possess. nu. 104. Pet. Greg. Synt. lib. 15. c. 29. J. Andreas de benef. c. 11. du. 10.*

(16.) In the Parish of *Aston* (in the County of *Warwick*) which hath a Parish Church, is a certain Chapel of *Ease*, called *Castle-Birmidge* Chapel, and a certain Precinct called *Castle-Birmidge*, the Inhabitants thereof resort to the said Chapel, and there Marry, Christen and receive the Sacraments; there are also Church-wardens, and the Inhabitants have a Perambulation there of it self; notwithstanding all which, when it came in debate, whether the Parishioners of the Chapel (the Parish-Church of *Aston* being in decay) might be taxed towards the Reparation thereof, they obtained a Prohibition on a Surmize, which not appearing to be true, a Consultation was awarded; yet in that case it was held, that if two Churches Parochial be united, the Reparation shall be several as before. And that a Chapel of *Ease* is part of the Parish, & *de communi jure* liable to reparations of the Parish Church; that such as have a Chapel of *Ease* may resort to the Parish Church; if they so please; and that the Parson of the Parish Church may Officiate at the Chapel of *Ease* if he will P.

P *Case Aston Parish ver. Birmidge Chapel. Hob. Rep.*

(17.) The Emperour *Justinian* in the fifth Collation of his Novel Constitutions, commonly called the *Authenticks*, emitted by him after the Digest and the Code, hath ordained, that no man build a Chapel in his house without the leave of the Bishop, and before he consecrate the place by prayer, and set up the Cross there, and make procession in the place; and that before he build it, he allot out Lands necessary for the maintenance of the same, and those that shall attend on God's Service in the place. In which Collation there is also that which seems to bear some conformity with the Acts of Uniformity, established in this Realm against Seditious Conventicles; For in that Collation it is likewise ordained by the said Emperour, That the sacred Mysteries or Ministeries be not done in private Houses, but be celebrated in publick places, lest thereby things be done contrary to the Catholick and Apostolick Faith, unless they call to the celebrating of the same such Clerks of whose Faith and Conformity there is no doubt made, or those who are thereunto deputed by the Bishop. But Chapels and places to pray in every man may have in his own House; if any thing be done to the contrary, the House wherein these things are done, shall be confiscate, and themselves punished at the discretion of the Prince q.

q *Auth. Coll. s. Vid. Rich. View, cap. 3. Sect. 6. par. 1.*

(18.) *A.* the Father had all his life the chief place in a certain Seat in the Church, and *H.* his Son likewise claimed the same, and *C.* disturb'd him in a violent manner; the Archbishop of *York*, in whose Jurisdiction this was, granted an Inhibition against *C.* till the matter

matter were determined before him, and excommunicated him for Disobedience. C. claimed the place by Prescription, and for that Reason prayed a Prohibition: And it was said, That the Excommunication was onely for his Contempt: And it is lawfull for the Bishop to grant such an Inhibition for the peace of the Church. And *Doderidge* agreed, That if the Bishop did inhibit any from making a disturbance in the Church, it was good, and therefore would not grant a Prohibition for well-doing. *Crew & Jones, &c.* But here he had not done well. *Doderidge* *è contra.* Then it was said, That here the Bishop had inhibited till the matter were determined before himself. And the whole Court agreed, That a Seat in a Church claimed by Prescription, and the priority therein likewise claimed by Prescription, is triable in this Court by an Action upon the Case, and not in the Spiritual Court. And at last it was agreed by the parties, that *H.* should remain in possession till the Matter were tried by Prohibition. And a Prohibition was awarded in the Case.^r

Note. That a Prohibition may not be granted after a Consultation.^t And as it seems, by the Course of Proceedings in the Court of the *King's Bench*, a Prohibition shall not be granted the last day of a Term, and such a motion ought not then to be made; but upon a motion there may be a Rule to stay proceedings till the next Term.^t

^r *Hutton's*
Case. Latch.
Rep.
^t *Cafe Bowry*
vers. *Walling-*
ton.
Latch. Rep.
^t *Anonymous*
dict. Rep.
Latch.

(19.) It was moved in the King's Bench for a Prohibition to the Ecclesiastical Court at *Worcester*, and shewed for cause (1.) That the Suit there was for Money, which by the assent of the greater part of the Parishioners of *D.* was assessed upon the Plaintiff for the Reparation, *viz.* for the Re-casting of their Bells; the Truth is, That the charge was for making of new Bells, where there were Four before, whereby it appears that it is merely matter of curiosity, and not of necessity, for which the Parishioners shall not be liable to such Taxations, and herein it was relied upon 44 *E. 3.* 19. by *Finchden.* (2.) The party there is overcharged, of which the Common Law shall judge. 3. The party hath alledged, that he and all those who have an Estate in such a Tenement, have used to pay but Eleven shillings for any Reparation of the Church. But the Prohibition is denied; and by *Doderidge* in the Book of 44 *E. 3.* there was a By-law in the case to distrain, which is a thing merely Temporal, for which the Prohibition was granted *& per Curiam*; in this case the Assessment by the major part of the Parishioners bind the party, albeit he assented not to it: And the Court seemed to be of opinion, That the Custome was not reasonable, because it laid a burthen upon the rest of the Parish. *Lisleton* of Council of the other side, Suppose the Church fall, shall he pay but Eleven shillings? *Whitlock*, If the Church falls, the Parishioners

* Mic. 2 Car. are not bound to build it up again, which was not denied by Justice Poph. Rep. *Jones v. Reparations.*

(20.) *Roberts* and others of *East-Greenwich* were cited in the Ecclesiastical Court to pay money that the Church-wardens had expended in Reparation of the Church; and the Inhabitants alledged, that the Tax was made by the Church-wardens themselves, without calling the Freeholders, and also that the Moneys were expended in the Re-edifying Seats of the Churches, which belonged to their several houses: And they never assented, that they should be pulled down. And now the Allegation was not allowed in the Ecclesiastical Court, but Sentence was given against them. And then they appealed to the *Archies*, where this Allegation was also rejected; and for that he prayed a Prohibition: And the Court agreed, That the Tax cannot be made by the Church-wardens, but by the greater number of the Inhabitants it may, and a Prohibition was granted. But by *Yelverton*, if they be cited by *Ex Officio*, a Prohibition will not lie; for so was it *Ex insinuatione*, &c. For the Wardens came and prayed a Citation, &c. But by *Richardson*, *Harvey* and *Crook* privately, a Prohibition will lie in both cases *.

* The Case of *Roberts* and others in *Hertley's Rep. Seats in a Church.*

(21.) *E.* libels in the Ecclesiastical Court against *A.* pretending that a Seat that the other claimed always in the Church, belonged to his House, and Sentence in that Court was given against *E.* and Costs *pro falso clamore*. And he appealed to the *Archies*, and there when they were ready to affirm the Sentence, he prayed a Prohibition. And it was moved by *Davenport*, that it may be granted: and he cited one *Tresham's Case* 33 *Eliz.* where in such a case a Prohibition was granted after an Appeal. *Richardson*, There is no cause for any Prohibition, but in respect of the costs. *Hutton* said it was a double vexation, and the party shall not have costs for that. *Hitcham* said, they came too late to have a Prohibition for the Costs. *Richardson*, that is not like to the Probat of a Will, where a thing may fall out triable at the Common Law. But there the Principal was tried at the Common Law; for they had it as in right. *Hutton*, Seats in the generality are in the power of the Ordinary to dispose; it is the Prescription which makes that triable at the Common Law; and if Prescription be made there, and it be found, then he shall pay costs. *Richardson*, All Disturbances appertain also to them; if it be not upon the Statute of 5 *Ed. 6.* But if a Title be made there by Prescription, it is merely *coram non Judice*; and if they cannot meddle with the Principal, it is not reason that they should tax Costs. And a Prohibition was granted.

* *Eaton* against *Ayliffe*, *Hertley's Rep. Reparation of of the Church.*

(22.) *H. Farmer* of a Manour; *A.* and other Church-wardens libel against him in the Ecclesiastical Court for a Tax for the reparation

tion of the Church. *Henden* moved for a Prohibition because that first, the Libel was upon a Custome, That the Lands should be charged for Reparations, which Customes ought to be tried at the Common Law. And secondly, Because the custome of that place is, that Houses and arable Lands should onely be taxed for the Reparations of the Church, and Meadow and Pasture should be charged with other Taxes. But the whole Court on the contrary: First, although that a Libel is by a custome, yet the other Lands shall be dischargeable by the Common Law; but the usage is to alledge a custome; and also that Houses are chargeable to the Reparations of the Church, as well as Land. And thirdly, That a custome to discharge some Lands is not good. Wherefore a Prohibition was granted^a.

Note, that where a man sued in the Ecclesiastical Court, prescribing to have a Seat in a Church *ratione Messuagii* where he inhabited; upon the motion of Serjeant *Henden*, a Prohibition was granted, for it is a Temporal thing^a.

Note, By *Coke* Chief Justice, That the keeping of a Church-Book for the age of those, which should be born and Christened in the Parish, began in the 30th year of *Henry the Eighth*: by the instigation of the Lord *Cromwel*^b.

A man was indicted upon the Statute of *Ed. 6.* That in the Church-yard, such a day, *extraxit gladium* against *J. L. & ipsum* the Church-yard. *percussit*; and because the Statute was, *If any person maliciously strike another; or shall draw any Weapon with an intent to strike any person*: And the Indictment was *quod extraxit*, but does not say *ad percussendum*: And because it is *quod percussit* without saying *malitiose*, the party was discharged upon Judgment^c.

If there be a Parson impropriate of a Church, and also a Vicar endowed of the same Church, the Trees in the Church-yard do there belong to the Vicar, and not to the Parson; for that there the Vicar ought to repair the Church, and he shall have the Trees which ought to repair the Church. *Dubitatur. Mich. 13 Jac. B. R. Bellamy's Case*^d.

The Lord *Coke* said, That for the Body of the Church, the Ordinary is to place and displace; in the Chancel the Freehold is in the Parson, and it is parcel of his Glebe; Trespass will lie by the Heir for pulling down the Coat-Armour, &c. of his Ancestours, set up in the Church: a Pew cannot belong to a House.

(23.) An Inhabitant of the Parish of *D.* hath Land in his occupation in the Parish of *S.* The Church-wardens of *S.* and other the Parishioners there make a Tax for the Reparation of the Church, for Ornaments of the Church, and for the Sexton's wages, amounting to the sum of 23*l.* and the Tax of the Church being deducted,

^a Hill. 4 Car.
B.R. *Andrew*,
verf. *Huton*.
Heiley's Rep.
^a *Noy's Rep.*
post *Cafe*
Gore verf.
Stark.

^b Post *Cafe*
Tyrwhite verf.
Kynaston.
Noy's Rep.

Striking in
the Church-
yard.

^c *Hart* verf.
Arrowsmith.
Post *dict. Ca.*
Noy's Rep.

Trees in the
Church-yard.

^d *Rol. Abr.*
verb. *Parson*,
nu. 3.
Seats in the
Church.
Browl. Rep.
p. 1. Cases in
Law, &c.

Reparations
of the Church.

cometh but to 3 l. onely. The Foreigner which dwells in D. is sued in the Ecclesiastical Court by the Church-wardens of S. for his part of the said Tax; and he prays a Prohibition. *Henden* said, he well agreed the Case of *Jefferies*, 5 *Coke*, that he should be charged, if this Tax had been for the Reparation of the Church onely; for this is in nature real. But when that is joined with other things, which are in nature personal, as Ornaments of the Church, or Sexton's wages, with which, as it seems he is not chargeable, then Prohibition lies for all. *Flemming* Chief Justice, and *Williams* Justice, thought fit that he should not have a Prohibition: for as well the Reparations of the Church, as the Ornaments thereof, are merely Spiritual, with which this Court hath nothing to doe; and *Flemming* said, that such Tax is not any charge issuing out of the Land, as a Rent, but every person is taxed according to the value of the Land; But *Telverton* and *Fenner* to the contrary, that a Prohibition doth lie, for the same diversity which had been conceived at the Bar; and also they said, that he which dwells in another Parish, doth not intend to have benefit by the Ornaments of the Church, or for the Sexton's wages: And for that it was agreed by all, by the Chief Justice, *Williams*, and the others, that if Tax be made for the Reparation of Seats in the Church, that a Foreigner shall not be taxed for that, because he hath no benefit by them in particular; and the Court would advise. In *Penner* and *Crompton's* Case it was held, that none shall be chargeable for Contribution to the Church-reckonings if he do not inhabit there, or consent to them. *More's Rep.*

Reparations
of Church-
Seats.

* Pasf. 8 Ja.
B. R. Wag-
ner and Wood.
Brownl. Rep.
par. 2.
Mic. 8 Jac. B.
R. Brown.
ubi supra.

(24.) Note, upon a motion for a Prohibition, that if a Parson contract with me by word, for keeping back my own Tithes for three or four years; this is a good Bargain by way of Retainer: and if he sue me in the Ecclesiastical Court for my Tithes, I shall have a Prohibition upon this composition. But if he grant to me the Tithes of another, though it be but for a year; this is not good unless it be by Deed.

Seats in the
Church.

* Mich. 11
Jac. B. R. per
Cur. & Mich.
10 Jac. B.
Pym's Case,
per Cur. Hob.
Rep. 95. &
More Rep.

(25.) The disposal of Seats in the Body of the Church doth belong of common right to the Ordinary of the Diocese, so as he may place and displace at his pleasure. If a man and his ancestours, and all those whose Estate he hath in a certain Messuage, have used time out of mind, &c. to repair an Isle of the Church, and to sit there, and none other: the Ordinary may not displace him; for if so then a Prohibition lies, for that he hath it by prescription upon reasonable consideration: Likewise if a man prescribe, that he and his Ancestours, and all those whose Estates he hath in a certain Messuage, have used to sit in a certain Pew in the body of the Church time out of mind, &c. in consideration that he, &c. have used

used time out of time to repair the said Seat. If the Ordinary remove him from that Seat, a Prohibition lies, for in this case the Ordinary hath not any power to dispose thereof; for that it is a good prescription, and by intendment there may be a good consideration for the commencement of that prescription, although the place where the Seat is be the Parson's Freehold. In this case a Prohibition was granted to the Bishop of Exeter for one Cross. But if a man prescribe to have a Seat in the Body of the Church, generally without the said consideration of repairing the Seat, the Ordinary may displace him^b. But with the Seats in the Chapels annexed to Noblemens Houses, it is said the Ordinary hath nothing to doeⁱ. If there be a Custome in a Parish, that 12 of the Parishioners may chuse the Church-wardens, which Church-wardens have power by the custome to repair the old Seats, and erect new in the Body of the Church, and to appoint who shall sit in them; And the Church-wardens so elect, erect a new Seat in the Body of the Church, and appoint a certain person to sit there; and after the Ordinary decree, That another shall have the Seat: In this case it is said a Prohibition lies, for the custome hath fixt the power of disposing the Seats in this case in the Church-wardens; and a Prohibition was granted: But it was also partly granted, for that the Sentence of the Ordinary was, that T. should have the Seat to him and his Heirs, and that none should disturb him in pain of Excommunication, which is unreasonable; and by that Sentence he and his Heirs shall have it, although they be not Inhabitants within the Parish^k.

(26.) The Ecclesiastical Court hath cognizance of the Reparations of the Body of the Church^l. If a man that dwells in one Parish, hath Land in another, the which he keeps in his own hands and occupation, he shall be charged for that Land for the Reparation for the Church of that Parish where the Land lies, for that he may come when he will, and it is a charge in respect of the Land^m. But if an Inhabitant in one Parish, lease out his Land which he hath in another Parish, reserving Rent, he shall not be charged where the Land lies, in respect of the Rent, because there is a Parishioner and an Inhabitant that may be chargedⁿ. And a man cannot be charged in the Parish where he doth inhabit, for Land which he hath in another Parish, to the Reparation of the Church, for that he may then be twice charged, for he may be charged for that in the Parish where the Land doth lie^o; in which case Prohibition hath been granted.

(27.) If a Citizen of London erect a House in the Parish of A. with intent of dwelling there in time of Sicknes at London, and hath not any Land in the Parish and after is assessed 20 s. for

Tr. 12 Ja.
B. Cross's Ca.
Revol. per
Cur. & M. 13
Ja. B. Laugb
and Hussy.
Revol. & M.
13 Ja. B.
Boothby and
Day Hob.
Rep. 95. Rol.
Abr. p. 288.
M. 11 Jac.
B. R. per Cur.
& dict. Case
Boothby Hob.

Tr. 12 Ja.
A. Agreed.
Rol. Abr.
fo. 288.

Pasch. 16
Jac. B. R. inter
Brabin &
Tredennick
for a Seat in
the Church
of St. Breock
in Cornwall.
Vid. Rol. Abr.
verb Prohibi-

tion, p. 288.
Co. 5. Jef-

frey's Case 67.
Resolved.

Reparations
of the Church.
Co. ibid.

Tr. 11 Jac.
B. Andrews
Case, per Cur.

Contr. M. 40,
41. El. B. R.
per Cur.

Co. ibid.
Jeffrey's Case.
Revol. M. 5.

Jac. B.
Pasch. 16.

Jac. B. R. Sir
H. Butler ver.
&c. Revolv.
Co. 5. Jef-

Repa-freys 67.

Reparation of the Church, where others who have 100 acres of Land in the same Parish, pay but 6*d.* yet no *Prohibition* shall be granted on a Suit for the said 20*s.* in the Ecclesiastical Court, for that they have jurisdiction of the thing, and for which reason they may order it according to their Law^{p.}

¶ M. 5. Jac.
B. Sir R.
Lee's Case.
per Cur.

(28.) If there be a Chapel of Ease within a Parish, and any persons of the Parish have used time out of mind, &c. alone and by themselves without others of the Parishioners to repair that Chapel of Ease, and there to hear divine Service, and to marry, and all other things, onely they bury at the Mother-Church; yet they shall not be discharged of Reparations of the Mother-Church, but ought to contribute to the same, for the Chapel was ordained onely for their ease^{q.} But if Inhabitants within a Chapelry prescribe to be discharged time out of mind, &c. of the Reparation of the Mother-Church, and are sued in the Ecclesiastical Court for the same, a *Prohibition* lies on that surmize^{r.}

¶ M. 13 Jac.
B. the Case of
the Church-
wardens of
Ashton, and
the Inhabi-
tants of Castle Bromage.

Hob. Rep. 91. ¶ Hob. Rep. 92.

Ornaments of
the Church.

¶ Mich. 20.
Jac. B. R.

(29.) If a man be rated for the Ornaments of the Church according to the Land which he hath in the Parish, a *Prohibition* lies, for the Rate for that ought to be according to the personal Estate^{t.} Also if a man who is not any Inhabitant within the Parish, but hath Land there, be rated for the Ornaments of the Church according to the Land, a *Prohibition* lies; for the Inhabitants ought to be rated for that^{t.}; and it was said by *Telverson*, That it had been often so resolved.

¶ Ibid. Resol.
per Cur.

(30.) If all the Parishioners are not rated for the Reparation of the Church, but some are and some are not, and those that are rated be sued in the Ecclesiastical Court, a *Prohibition* will lie^{v.} But if the major part of the Parishioners of a Parish, where there are four Bells, doth agree that there shall be a fifth Bell made, and it be made accordingly, and a Rate made for payment of the same; it shall bind the lesser part of the Parishioners although they did not agree to it, for otherwise any obstinate persons may hinder any thing intended to be done for the Ornaments of the Church; and therefore in this case a *Prohibition* was denied^{x.}

¶ Mich. 11
Car. B. R.
per Cur.

¶ Mich. 2
Car. B. R.
per Cur.

(31.) The Ecclesiastical Court may not try the Bounds of a Parish; if therefore there be a Suit there depending for that a *Prohibition* will lie; as where the difference is between two Vicars concerning a Chapel of Ease; As when the Vicar of a Parish Libels against another to avoid his Institution to the Church of *D.* which he supposes to be a Chapel of Ease belonging to his Vicarage: if the Defendant suggest, that *D.* is a Parish of it self, and not

not a Chapel of Ease, a Prohibition lies, for they may not try the Bounds of a Parish 7.

(32.) If a Vicar sue the Parson Improperly for damages for cutting down the Trees growing in the Church-yard, a Prohibition lies; for that if the Trees belong to him, he may have Tre-spafs at Common Law; And in this case a Prohibition was granted 2.

(33.) One being sued in the Ecclesiastical Court for money for reparation of the Church, prayed a Prohibition and had it, and after it was moved for a Consultation. The case was this, viz. The party that was sued, prefcrib'd that there is a Chapel within the same Village, in which they have had at all times *Sacramenta & Sacramentalia*, and that he nor the Inhabitants of that Village which resort to the said Chapel, have ever used to repair the said Church; the first point in this case was, whether the Prescription were good and the *Chief Justice* said, that it is contrary to common right, that they who have a Chapel of Ease in a Village should be discharged of repairing the Mother-Church; and it may be that the Church being built with Stone, it may not need any Reparation within the memory of man, and yet that doth not discharge them without some special cause of discharge shewed. The second point was the taking away of an Objection, as they said, *vid.* That a Prescription which is incident to Ecclesiastical things, shall be tried in the Ecclesiastical Court, and so that Objection removed, and commonly the Church-wardens are chosen in the Ecclesiastical Court, yet the Lord of a Manour may prescribe for that, and then it shall not be tried in the Ecclesiastical Court, although it be a Prescription of what appertains to a Spiritual thing.

(34.) Note, that in the case of Church-wardens, the *Chief Justice* said, That for the repairing the Fabrick of the Church the charge is real, and charges the Land and not the Person; but for the Ornaments of the Church it is personal, and there if a man be not an Inhabitant within the Parish, he is not chargeable in respect of his Land, for such Tax doth charge the goods onely. And to this *Chamberlain Justice* agreed, and none denied it; but where there is a Farmer of the Land, there the Farmer alone shall not be charged, for it is not reason that a poor Husbandman, who pays Rent for his Land, and perhaps to the utmost value, should build Churches; but it may be unknown to the Parson and the Church-wardens who hath the Fee in reversion, and therefore they may impose the whole Tax on the Farmer, and he by way of Answer may alledge in the Ecclesiastical Court that he is but the Farmer, and thereupon the Tax shall be divided between him and his Landlord, according

7 Mich. 14.

Jac. B. R.

Fisher and

Chamberlain,

Refol. & Hil.

41 El. B. R.

Piper and

Barnaby, Ad-

judg'd & Hil.

13 Jac. B. R.

Foster & Hide.

Adjudg'd.

7 Mic. 12 Ja.

B. R. Bell-

my's Case,

Refolv'd.

Hill. 19 Jac. B.

R. Rot. 923.

Pester verfi.

Rose Edmunds.

Wid. Rol.

Rep.

Hill. 20 Jac. B.

R. Church-

wardens

Case. Roll's.

Rep.

cording to the Rate which the Land is worth more than the Rent, and on the Landlord according to the quantity of the Rent, *quod quere*, for in *Jeoffrie's Case* ; *Coke* it is resolved, that the Farmer alone is chargeable, and that a Consultation was granted, but not for that reason, but for that the Reversioner had pleaded an insufficient plea in the Ecclesiastical Court, *viz.* That he was not an Inhabitant within the Parish, which is not a good plea, as also for the great delay which he had used, having made or brought two Appeals, and after a Prohibition, and so had put the Parish to 60*l.* charge for the recovery of 6*l.* and for that reason chiefly, and not on the matter in Law was the Consultation granted.

Cro. par. 2. (35.) In *Frances and Ley's Case*, it was Resolved by the Justices, that Coats of Arms placed in Windows, or a Monument placed in the Church or Church-yard, cannot be beaten down or defaced by the Parson, Ordinary, Church-wardens, or any other : And if they be, the Heir by descent interested in the Coat, &c. may have an Action of Trespass.

Mich. 18 Jac. B. R. Dawney and Dee's Ca. Cro. par. 2. (36.) In an Action upon the Case, *D.* shewed he was seized of a Messuage and Land in *P.* to the same belonging, and in the Parish of *P.* time whereof, &c. and yet is a Chapel in the North part of the Chancel, called the *Parson's Chancel*, and the Plaintiff and all those, &c. have used to sustain and repair the said Chancel, and have used for him and his Family to sit in Seats of the said Chancel, and to bury there the persons dying in the said Messuage, and that none other during all the said time, &c. without their License, have used to sit there, or to be buried there, and that the Defendants *Premissorum non ignari, malitiose impediverunt* him to enter, and sit in the said Seat.

Seats in a Chapel.

The Defendant said, that the Earl of *N.* was seized of the Honour of *F.* and the said Chapel was parcel of the said Honour, and that the Defendants being Servants of the said Earl, and resident within the said Honour, did divers times in the time of the divine Service sit in the Seats of the said Chancel, by the command of the said Earl ; upon which it was demurred : Exceptions were taken to the Declaration, because he prescribes to have a Liberty appertaining to his House, and doth not shew it is an Ancient House. And (2.) That the Allegation of the disturbance was ill, being general, without alledging a special Disturbance, and how he was disturbed. *Resolved*, That when it is supposed he is seized in Fee of a Capital Messuage, and time, &c. it is there included, that it is an ancient Messuage, and so he might have such a privilege ; and for the second, it is sufficient to alledge a general disturbance, as is usual in the case of a Fair or Market.

(37.) *D.* was

(37.) D. was indicted upon the Statute of 5 E. 6. for striking in Paul's Church-yard; he pleaded that he was by the Queen's Letters Patents created Garter King of Arms, and demanded Judgment because he was not so named: It was the opinion of the Court. that because it was a parcel of his Dignity and not of his Office onely, and because the Patent is, *Creamus, coronamus & nomen imponimus de Garter Rex Heraldorum*, that therefore in all Suits brought against him; he ought to be named by this name; and thereupon he was discharged of the Indictment. And in Penhallo's Case who was indicted upon the same Statute, for drawing of Dagger in the Church of B. against J. S. and doth not say, with intent to strike him; for which cause the Judgment was quashed. Likewise in Child's Case, who was indicted for striking in the Church-yard; and it was *apud generalem Sessionem Pacis tent. apud Blandford*, and it was not said [*in Comitatu predicto*] for which reason the party was discharged, though the County was in the Margin.

Pasc. 33 Eliz.
B. R. De-
thick's Case.
Cro. p. 1.

Striking in
the Church-
yard.

Penhallo's Ca.
Cro. ibid.

Child's Case,
Cro. ibid.

(38.) In Pym's Case before-mentioned; Corven did libel in the Ecclesiastical Court against Pym for a Seat in a Church in Devonshire; And Pym, by Serjeant Hutton, moved for a Prohibition upon this Reason, that himself is seized of a House in the said Parish; and that he and all whose Estate he hath in the House, have had a Seat in an Isle of the Church: And it was Resolved by the Court, That if a Lord of a Manour, or other person, who hath his House and Land in the Parish, time out of mind, and had a Seat in an Isle of the same Church; so that the Isle is proper to his Family, and have maintained it at their charges; That if the Bishop would dispossess him, he shall have a Prohibition: But for Seat in the Body of a Church, if a question ariseth, it is to be decided by the Ordinary, because the Freehold is to the Parson, and is common to all the Inhabitants. And it is to be presumed, that the Ordinary who hath Cure of Souls, will take order in such cases, according to right and conveniency; and with this agrees 8 H. 7. 12. And the Chief Justice, Dame Wick her Case, 9 H. 4. 14. which was, The Lady brought a Bill in B. R. against a Parson, *Quare tunicam unam vocatam, A Coat Armour and Pennons*, with her Husband Sir Hugh Wick his Arms and a Sword, in a Chapel where he was buried; and the Parson claimed them as Oblations: And it was there held, that if one were to sit in the Chancel, and hath there a place, his Carpet, Livery and Cushion, the Parson cannot claim them as Oblations; for that they were hanged there in honour of the deceased: The same reason of a *Coat-Armour*, &c. And the Chief Justice said, the Lady might have a good Action during life in the case aforesaid, because she caused the things to be set up there; and after her death the Heir shall have his Action, they being

Corven's Case.
Co. lib. 10.

Right to Seat
in the Church.

being in the nature of *Heir-Looms* which belong to the Heir. And with this agree the Laws of other Nations. *Bartho. Cassana, fo. 13. Con. 29. Adio datur si aliquis Arma in aliquo loco posita debeat aut abrasit, &c.* And in 21 Ed. 3. 48. in the Bishop of *Carlisle's* Case. Note, That in *Easter-Term* it was resolved in the *Star-Chamber*, in the case between *Hussey* and *Katherine Leyton*, That if a man have a House in any Parish, and that he and all those whose Estate he hath, have used to have a certain Pew in the Church; that if the Ordinary will displace him, he shall have a Prohibition; but where there is no such prescription, the Ordinary will dispose of common and vulgar Seats.

A Chapel of Ease taxed by the Mother-Church for reparations thereof.

(39.) In the County of *Dorset* there was a Mother-Church and also a Chapel of Ease within the same Parish; they of the Mother-Church did rate and tax them of the Chapel of Ease, towards reparations of the Mother-Church, for the which, upon their refusal to pay the same, being sued in the Ecclesiastical Court. they prayed a Prohibition. and for cause alledged, that they themselves have used time out of mind, &c. to repair the Chapel at their own proper cost, without having any contribution at all from them of the Mother-Church, and that they have been exempted from all charges and reparations of the Mother-Church, and yet for their refusal to pay this Tax, they were libelled against in the Ecclesiastical Court, and a Sentence there passed against them; they therefore prayed a Prohibition. By the opinion of the whole Court a Prohibition lieth not in this Case, in regard that this Prescription is merely Spiritual, and therefore a Prohibition denied *per Curiam*.

A Presentment ex Officio, for not frequenting his Parish-Church.

Trin. 9 Jac. B. R. Bulstr. p. 1.

(40.) One was presented *ex officio* in the Ecclesiastical Court, for the not frequenting of his Parish-Church; he there pleads, That this was not his Parish-Church, but that he had used to frequent another Parish-Church, and to resort unto that: And because they in the Ecclesiastical Court would not receive his Plea, the Court was moved for a Prohibition, for that by the Law, in the time of King *H. 3. Ed. 3. and Ed. 4.* they in the Ecclesiastical Court have not any power to intermeddle with the Precinct of Parish-Churches, neither are they there to judge, what shall be said to be a man's Parish-Church: And so was the *Opinion of the whole Court*, and therefore by the Rule of the Court a Prohibition was granted.

Pasch. 8 Jac. B. R. Bulstr. p. 1.

(41.) Touching the Reparations of the Church, and who were liable thereunto, this being a question coming in debate before the Judges: It was resolved by the whole Court, That for and towards the Reparation of a Church, the Land of all, as well of For-
eigners there not inhabiting, as of all others, is liable thereunto, and this is so by the general custome of the place; and this is to be raised

raised by a Rate imposed according to the value of the Land, and that in the nature of a *Fifteen*, and this is not merely in the Realty, *Williams* and *Telverton* Justices, and *Flemming* Chief Justice, Not the Land, but the person of him who occupieth the Land is to be charged. *Telverton* Justice, A man is chargeable for Reparations of a Church by reason of the Land; and for the Ornaments in the Church, by reason of his coming to Church. *Williams* Justice and *Flemming* Chief Justice, if the person have Land there he is chargeable for both, whether he come to Church or not, for that he may come to Church if he please.

(42.) In a Prohibition the Case was this: The Defendant did Libel before the Bishop of *London* in the Consistory Court, for a Seat in the Church; Sentence there passed against the Defendant, whereupon he appealed to the *Archies*. The Court was moved for a Prohibition, in regard the Title to the Seat or Pew was grounded upon a Prescription: The Court answered, &c. As for the Title we are not here to meddle with it, this being for a Seat in the Church. *Haughton* Justice, This disposition of Pews in the Church belongs of right to the order and discretion of the Ordinary: and to this purpose is the case of 8 H. 7. f. 12. and Sir *William Hall's* case against *Ellis*. *Doderidge* Justice, I moved this case in the Court of C. B. and it was for a Seat in the Church: An Action there brought for Disturbance, and I there cited *Hall's* Case; and 9 E. 4. fo. 14. The Case of the Grave-stone and Coat-Armour: for the taking of which an Action of Trespass lies at the Common Law, and therefore by the same reason an Action of Trespass should lie for such a disturbance in a Seat of a Church; but there the Judges did all of them say, That they would not meddle with the deciding of such Controversies for Seats in the Church, but would leave the same to them to whom more properly they belonged. *Croke* Justice, *Hall's* case was this, where a man did build an entire Isle in the Church, and was at continual charge to repair it; if he be disturbed in the use of this, he shall for this Disturbance have his remedy at the Common Law; and so it hath been adjudged; But the Judges all said, We are not here to meddle with Seats in the Church. *Doderidge* Justice, This Appeal here is like unto a Writ of Error at the Common Law; but it doth differ in this, By the Appeal the first Judgment or Sentence is suspended, but after a Writ of Error brought, the first judgment still remains until it be reversed. *Coke* chief Justice, It was *Pym's* Case in the *Common Bench*, and 8 H. 7. fo. 12. that the Ecclesiastical Court hath jurisdiction and power to dispose of Pews and Seats in the Church; But if there be an Isle built by a Gentleman, or by a Nobleman, and he hath used to bury there, and there hath his Ensign of Honour, as a Grave-stone, Coat-Armour, or the like,

Seats in a Church.

Mich. 11 Jac.
B. R. May against Gilbert
Bulst. par. 2.

which belongs not to the Parson; if he take them the Heir may well have an Action of Trespass: otherwise it is, where the same is repaired at the common charge of the Parish, there they have the disposing of them: *Ellis* and *Hall's* Case remembred, a *Kentish* Case, there the Seat was repaired by him, and was belonging to his Capital Messuage by prescription, and so triable at the Common Law: And so where the Case is Special, that the party doth wholly and solely repair the same, in such a case, if a Suit be there concerning such a Seat, a Prohibition well lieth, but not otherwise: But if a Nobleman comes to dwell in the Countrey, he is now within the sole order and dispose of the Ordinary for his Pew and Seat in the Church; and upon the former difference was *Pym's* case adjudged in the *C. B.* in this principal Case, a Prohibition was denied by the whole Court.

C H A P. XIII.

Of Church-wardens, Questmen and Sidemen.

1. *What such are in construction of Law; how the choice of them is to be made, and wherein the Office doth consist.*
2. *What Actions at Law may lie for or against them.*
3. *Whether Actions lie for the new Church wardens in Trespass done in time of their Predecessours.*
4. *Certain things appertaining to the Church within the charge and office of Church-wardens to provide and preserve.*
5. *Cases in Law touching the Election of Church-wardens.*
6. *What Sidemen or Questmen are, and their duty.*
7. *Action at Law against Church-wardens, touching Distress taken by them for money for relief of the Poor.*
8. *A Church-warden refusing to take the Oath of Enquiry on the 39 Articles, Action thereon.*
9. *What remedy in case the Archdeacon refuses to swear the Church-wardens elect.*
10. *The Injunctions of King Ed. 6. touching all Marriages, Baptisms and Burials to be Registred in the presence of the Church-wardens.*
11. *Whether the Release of one Church-warden, shall be a Bar to his Companion, in an Ecclesiastical Suit commenced by them both?*
12. *Prohibition, where Church-wardens have pretended a Custome to chuse the Parish-Clerk.*
13. *The like upon a Presentment by Church-wardens against one, in matter more proper for a Leet, than the Ecclesiastical Court, to take cognizance of.*
14. *The prevalency of Custome against a Canon, in choice of a Church-warden, in reference to a Vicar and the Parishioners.*
15. *If question be, whether Lands next adjoining unto a Church-yard shall be charged with the repairs of the Fences thereof; and Custome pleaded for it, in what Court cognizable.*
16. *In Action of Account by Parishioners against Church-wardens, by whom a Release of Costs is pleaded, but disallowed in the Ecclesiastical Court; whether prohibition lies in that case?*
17. *Whether Church-wardens are a Corporation qualified for Lands as well as Goods to the use of the Church?*
18. *The Church-wardens disposal of Goods belonging to the Church, without the assent of the Sidemen or Vestry, void.*

19. Church-

19. Church-wardens not Ecclesiastical Officers, but Temporal, Employed in the Ecclesiastical Affairs: Before whom are they to account?
20. Whether Church-wardens may have Action for Trespasse done to the Church in their Predecessour's time?
21. Whether the Parishioners by force of a Custome, or the Parson by virtue of a Canon, shall chuse the Church-warden; and whether Prohibition lies in that case.
22. Whether Church-wardens, as a Corporation may prescribe to take Lands to them and their Successours, to the use of the Church.

Oeconomus, vel (1.)

Ecclesia

Guardiani.

Church-wardens, if elected by Vestry, where good and capable to purchase

Lands. Vid. St. Saviours in South-wark's Case. Lane Rep.

^a Can. 115.

^b Can. 116.

^c Can. 117.

^d Can. 118.

C Church-wardens, or *Guardiani Ecclesia*, are certain Officers Parochial, annually elected or chosen by and with the consent of the Minister and a select number of the chief Parishioners, according to the custome of the place, to look to the Church and Church-yard, and to take care of the concerns thereof, and of such things as appertain thereto; as also to observe and have an inspection into the Behaviour, Lives and Conversation of their Parishioners, touching such faults and disorders as are within the cognizance and censure of the Ecclesiastical Jurisdiction. These Officers are a kind of Corporation, enabled to sue and be sued for any matters or things belonging to the Church or Poor of their Parish; and have as their Assistants, certain Sidemen or Questmen, who according to the custome of the Parish are yearly likewise chosen, to assist the Church-wardens in the Enquiry and presenting such offenders to the Ordinary as are within the Ecclesiastical cognizance and censure aforesaid; for which they are not to be sued or troubled at the Law by any such Offenders so presented as aforesaid; nor are they obliged to present oftner than twice a year, except it be at the Bishop's Visitation: yet they may present as oft as they shall think meet, if good occasion shall so require^b; but they may not (on pain of being proceeded against by their Ordinaries, as in cases of wilfull Perjury in Courts Ecclesiastical) willingly and wittingly omit to present such publick Crimes as they knew to have been committed; or could not be ignorant that there was then a publick fame thereof^c. Moreover, the Old Church-wardens are to make their Presentments before the New be sworn; till which time the Office of the old continues; the usual time for the New Church-wardens to enter upon their Office is the first week after *Easter*, or some week following, according to the direction of the Ordinary; before which, the Old Church-wardens shall exhibit the Presentments of such enormities as happened in their Parish since their last Presentments, and shall not be suffered to transmit or pass over the same to those that are newly chosen^d. By the Ninetieth Canon the choice of Church-wardens, Questmen, Side-

men,

men, or Assistants is to be made yearly in *Easter* week, and that by the joynt consent of the Minister and the Parishioners, if it may be; otherwise, the Minister to chuse one, and the Parishioners another; who at their years end, or within a month next after, shall in the presence of the Minister and the Parishioners make a just Account of what they have received and disbursed for the use of the Church, and shall deliver over what remains in their hands belonging to the Church, unto the next Church-wardens by Bill Indented.

Can. 89.

(2.) One brought Action on the Case against Church-wardens, for a false and malicious presentment of him in the Spiritual Court, and found for the Defendants; They prayed double Costs on the Statute of 1 Jac. But Jones, Crook and Berkley, Justices, denied it, for that the Statute doth not extend to Church-wardens for things of their Office in Ecclesiastical Causes. They have their Action of Trespass at the Common Law for such things taken away out of the Church, as belonged to the Parishioners in reference to the Church. And the Release of one of the Church-wardens, is no Bar in Law to the other. If one take away the Chalice or Surplice out of the Church, Action of Trespass lieth against him at Common Law, and not in the Ecclesiastical Court. So if one lay violent hands on an Ecclesiastical person, an Action lies in the Ecclesiastical Court, but he shall not there sue for damages. If the Organs, or Parish-Bible or the like, be taken away out of the Church, the Action lies at the Common Law and not in the Spiritual Court for the same, for the Church-wardens may have their Action at Common Law in that case. But if the Parson take away out of the Church the Scutcheon or Banner of some person deceased, his Widow (if she did put it there, and it be taken away in her life time) may have her Action of Trespass at Common Law, or after her decease the Heir may have the same Action.

Mich. 8.
Car. B. R. Ca.
Kercheval
vers. Smith &
alios. Jones
Rep.
11 H. 4.
Trin. 12 Jac.
B. R. Buck-
sale's Case.
Roll. Rep.
14 Jac. B.
R. in Motam's
Case. Roll. ib.
Per. Dod.
Mich. 13 Jac.
B. R. Bella-
mie's Case.
Rol. Rep.
Ibid.
Dica. Buck-
sale's Case.
It is Felony.
Co. 9 Ed.

and Sacrilege to steal away the Parish-Bible out of the Church, and suable at Common Law.
4. & Trin. 12 Jac. Bucksale's Case. Roll. Rep.

(3.) Trespass brought by the Church-wardens of B. and declared That the Defendant took a Bell out of the said Church, and that the Trespass was done 20 Eliz. It was found for the Plaintiff. It was moved in Arrest of Judgment, that it appears by the Declaration, that the Trespass was done in the time of their Predecessours, of which the Successour cannot have Action: and *Actio personalis moritur cum persona*, Vid. 19 H. 6. 66. But the old Church-wardens shall have the Action, Coke contrary, and that the present Church-wardens

wardens shall have the Action, and that in respect of their Office, which the Court granted. And by *Gawdy*, Church-wardens are a Corporation by the Common Law, *Vid.* 12 H. 7. 28. by *Frowick*, That the new Church-wardens shall have an Action upon such a Trespass done to their Predecessours; Contrary by *Taxley*. *Vid.* by *Newton* and *Paston*, that the Executours of the Guardian in whole time the Trespass was done, shall have Trespass.

• Hill. 31 E.
liz. C. B. The
Church-ward-
ens of Fe-
therstone's
Case. Leon.
Rep.

(4.) It is the duty of Church-wardens not onely to take care of the concernments of the Church, and to present Disorders, as afore-said, but also to provide Bread and Wine against the Communion, the Bible of the largest Volume, the Book of Common Prayer, a decent Pulpit, a Chest for Alms, Materials for repairing the Church and fencing the Church-yard, and the like, all at the Parish-charge, and shall, what in them lies, prevent the prophanation of Churches by any usage thereof contrary to the Canons. It was agreed by the Court in *Robert's Case*, that a Tax for the Church cannot be made by the Church-wardens onely. *Heuley's Rep.*

• But's Case.
Noy Rep.

(5.) In *But's Case*, *Moore* Serjeant moved at Court for a Prohibition, because where the custome of the Parish or Village was, that the Parishioners have used to elect two Church-wardens: and at the end of the year, to discharge one and elect another in his room, and so *alternis vicibus*, &c. By the New Canon now the Parson hath the Election of one, and the Parish of the other; and that he that was elected by the Parishioners, was discharged by the Ordinary at his Visitation; and for that he prayed a Prohibition. *Et allocat.* as a thing usual and of course. For otherwise (by *Hubbard*) the Parson might have all the Authority of his Church and Parish. The like Case to this we have elsewhere reported, *viz.* The Parson and Church-wardens in *London* by the Custome are a Corporation, and the Parishioners time out of mind, &c. have used at a certain day in the

*Vestry, from
Vestments,
the place
where the holy
Vestments are
kept. This is
used once in
the Bible, and
but once, 2
Kin. 10. 22.
where the
Baalites kept
their Vest-
ments.

*Vestry to elect Church-wardens; they elect *A.* and present him to the Archdeacon who refuses *A.* and forbids him to exercise the Office of a Church-warden, because the Parson pretended, that by the new Canon the Election of Church-warden belonged to him to dispose, &c. and exercise the Office of Church-warden. And *A.* is sued *ex Officio* in the High Commission Court, amongst other things touching that: *A.* prays a Prohibition because the Canon does not take away the Custome. Also it would be very mischievous, if the Parson should elect whom he please to be Church-warden. And the Parson and Church-wardens being a Corporation, then they may dispose of the Goods and Land of the Parish as they please. *Coke* Chief Justice said, that a Convocation hath power to make Constitutions for Ecclesiastical Things or Persons, 20 H. 6. 14. 21 E. 4. 46. But they ought to be according to the Law and Custome of the Realm.

Realm. And they cannot make Church-wardens that were Eligible, to be Donative without Act of Parliament; and the Canon is to be intended where the Parson had nomination of a Church-warden before the making of the Canon. And now Rule was given for a Prohibition, if cause be not shewn to the contrary, &c. *ex motione Serjeant Foster P.*

(6.) As touching *Sidemen*, otherwise called *Questmen*, they are onely such as are annually chosen, according to the custome of every Parish to assist the Church-wardens in the enquiry and presenting such Offenders to the Ordinary, as upon such Presentments are prosecuted and punishable in the Ecclesiastical Court.

(7.) In an Action of Trespass against the Church-wardens where, by the Statute of 43 *Eliz. cap. 2.* if for a distress taken by them, for money for the relief of the Poor, Trespass be brought against them, and Verdict pass for them, the Defendants shall recover treble Damages with their costs; And that to be assise, &c. by the same Jury, or by Writ of enquiry of Damages, it was Resolved (1.) That the costs shall not be trebled, but onely the Damages. (2.) That the treble Damages are well assise by the Jury, although that it be done not by the Court. Because the words are [by the same Jury to be assise] and not Damages to be trebled by them^a.

(8.) Upon an *Habeas Corpus* the Case was returned to be, That *H.* being Church-warden, refused to take the Oath of Enquiry of the 39 Articles touching Ecclesiastical matters. And the warrant of the Commitment of the High Commissioners was to retain him, and until we shall give order for his delivery. By the Court, &c. Until we that is, All we, 12 *Ed. 4. 3. a.* 1 *H. 7. 7. a.* that is not good; for if then any of them dies, or be removed, The party shall never be delivered by that means: But it ought to be, Until he shall be lawfully delivered. But notwithstanding the Church-warden was not out upon Bail, because now also he refused to take that Oath: But with a *So far forth as the Articles do agree with the Law of God and the Land.* Note, that such subscription or consent to the Articles 13 *Eliz.* by a Parson is not good. As it was Adjudged in 33, & 34 *Eliz. B. R. Clark* against *Smithfield*; But afterwards the Church-warden was delivered by the High Commissioners^b.

(9.) If the Parishioners have time out of mind used to chuse two Church-wardens yearly, and to present them to the Archdeacon to be sworn, and he have used to swear them, and upon such election and presentation to him to be sworn, he shall refuse to swear them, a Writ may issue out of the King's Bench, directed to the Archdeacon, commanding him to swear them, *Mich. 15 Jac. B. R.* such Writ was granted for the Church-wardens of *Sutton Valence in Kent*; for although there was a Canon made *primo Jac.* to

^a Mic. 4 Jac.
C.B. No Rep.
These Sidemen
were called
Testes Syno-
dales ancient-
ly styled Sy-
nods-men,
thence corrupt-
ly called now
Side-men.

^a Okely verf.
Salter. No's
Rep.

^b Wharton's
Case. No's
Rep.

the contrary, yet that cannot take away the custome, *Tr. 15 Car. B. R.* The like Writ was granted for the Church-wardens of the Parishes of *Ethelborough* and *St. Thomas Apostles* in *London*, after divers motions, and upon hearing of the Council on both sides, *Pasch. 4 Car. B. R. Rot. 420.* between *Draper* and *Stone*. The like Writ was granted for the Church-wardens of *Holberton* in *Devon*.
 * Roll. Abr. If one be chosen Church-warden, and the Official of the Bishop refuse to administer his Oath to him, he shall have a special Writ directed to the Official, commanding him to give him his Oath, *Tr. 17 Jac. B. R. Bishop's Case. Roll. Rep. Note*, That an Attorney cannot be a Church-warden: if he be chosen, and refuse, and be sued for such a Refusal in the Ecclesiastical Court, he may have a Prohibition. *Pasch. 14 Car. 1. B. R. in Wilson's Case, & Trin. 15 Car. 1. B. R. Barker's Case. Roll's Cases, 2 par. fo. 272.*

(10.) By the Injunctions of King *Ed. 6. An. 1547.* to all the Clergy as well as Laity of this Realm, it is required, That the Parson, Vicar or Curate, and Parishioners of every Parish within this Realm, shall in their Churches and Chapels keep one Book or Register, wherein they shall write the day and year of every Wedding, Christning and Burial, made within their Parish, &c. and therein shall write every Persons Name that shall be so Wedded, Christned or Buried. And for the safe keeping the said Book, the Parish shall be bound to provide of their common Charges, one more Coffer, with two Locks and Keys, whereof the one to remain with the Parson, Vicar or Curate, and the other with the Wardens of every Parish Church or Chapel, wherein the said Book shall be laid up: which Book they shall every Sunday take forth, and in the presence of the said Wardens, or one of them, write or record in the same, all the Weddings, Christnings and Burials made the whole Week before; and that done, to lay up the Book in the said Coffer, as before. And for every time that the same shall be omitted, the party that shall be in the fault thereof, shall forfeit to the said Church three shillings four pence, to be employed to the Poor mens Box of that Parish.

* Vid. Bish.
Sparrow's
Collect. &c.
p. 5.

Hill, 7 Jac.
 1609. B. R.
Barton's Ca.
Brownl. Rep.
par. 2.

(11.) A man taxed by the Parish for Reparation of the Church was sued for the Tax by the Church-wardens in the Ecclesiastical Court: Depending this Suit one of the Church-wardens released to the Defendant all Actions, Suits and Demands; the other Church-warden proceeded in the Prosecution of the Suit, and upon this the Defendant procured a Prohibition; upon which matter shewed therein was Demurr joined. *Davenport* moved for a Consultation. The Question was, where two Church-wardens sue in the Ecclesiastical Court for a Tax and one of them release, whether that Release shall barr his Companion or not? It seemed to him, that this

this Release shall not be any Barr to his Companion, or impediment to sue; for he said, That Church-wardens are not parties interested in the Goods of the Church, but are a special Corporation for the Benefit of the Church; for which he cited the Case in 8 E. 4. 6. The Church-wardens brought Trespass for the Goods of the Church taken out of their possession, and they counted *ad damnum Parochianorum*, and not to their proper damage; and the 11 H. 4. 12. 12 H. 7. 27. 43 H. 7. 9. where it is said expressly, That the Wardens of a Church are a Corporation onely for the benefit of the Church, and not for the disadvantage thereof: but this Release sounds to the disadvantage of the Church, and therefore seems to be no Bar: Also this Corporation consists of two persons, and the Release of one is nothing worth; for he was but one Corpse, and the moiety of the Corpse could not release; and for these Reasons he prayed a Consultation. *Telverton* to the contrary, and he took a difference and said, that he agreed, that if the Wardens of the Church have once possession of the Church, there in Action of Trespass brought for these Goods one Warden cannot release: But this Tax for which they sue is a thing merely in Action, of which they have not any possession, and there he cannot Sue alone, and there, for this Release shall barr his Companion. The Court interrupted him and said, That clearly Consultation shall be granted, *Fleming* Chief Justice, we have not need to dispute this Release, whether it be good or not? and there is a difference where Suit is commenced before us, as if Church-wardens brought Trespass here for Goods of the Church taken, and one Release, then we might dispute whether this Release were good or not; but when the matter is originally begun before them in the Ecclesiastical Court, and there is the proper place to sue for this Tax, and not any where else, we have nothing to doe with this Release; for which reason by the whole Court a Consultation was granted. In an Action in the Ecclesiastical Court by two Church-wardens, if the Defendant plead the Release of one of them, that shall be tried there, and no Prohibition shall be granted. *Vid. Roll. Abr. verb. Prohibition, pag. 306. nu. 3.*

(11.) If the Church-wardens of a Parish have used time out of mind, &c. to chuse the Parish-Clerk, and Suit be in the Ecclesiastical Court to remove him, and to put in one of the Parson's choice, Prohibition lies, as in *Walpole's Case*; but there the Prohibition was granted by the consent of parties, to try the Custom. The like Prohibition was granted between *Brown and Crawshawe* for *White Chapel* Parish. And the like granted between *Beaumont and Westley* for the Parish of *St. Cuthberts* in *Wells*. *Mic. 22 Jae. B.R. Between Walpole & Coldwel for the Clerk of S. Tho. Apost. Lond. Intra-tur Hill. 22. Jac. Rot. 466.*

P. 19 Jac. B. R. Rot. 177. (13.) If a Presentment be made by the Church-wardens of a Parish in the Ecclesiastical Court, That *J. S.* one of the Parishioners is a Railer and Sower of Discord among his Neighbours, a Prohibition lies; for that belongs to the *Leet*, and not to that Court, unless it were in the Church or such like place.

P. 11 Car. B. Smith and Pannel's Case. Hob. Rep. Case. 311. (14.) Where the Parishioners of a Parish have used time out of mind, &c. to chuse one Church-warden and the Vicar another, and afterwards a Canon is made; that the Vicar shall chuse both, and so he doth accordingly, and the Parishioners shall chuse one according to the Custome, and the Ordinary disallow him, and confirm the two chosen by the Vicar, a Prohibition hath been granted in this case. So likewise a Prohibition was granted against the Church-wardens, chosen by the Parson of *St. Magnus* near *London-Bridge* by force of the Canon, on a surmise, That the Parish had a custome to Elect both Church-wardens. The like also was granted for *Abchurch* in *London*.

P. 5 Jac. B.R. The Parishioners of Rolvendon in Kent. Adjudg'd. Tr. 7 Car. B. R. between Shirley and Brown. Rot. 1, 91. P. 4 Car. B.R. Rot. 420. Draper and Stone. Mic. 14 Car. B. R. The Church-wardens of Claydon and Duncombe. Roll. Abr. pag. 287. (15.) Where the Church-wardens sued in the Ecclesiastical Court *J. S.* supposing in their Libel, that he and all those whose Estate he hath in certain Land next adjoyning to the Church-yard, have used time out of mind, &c. to repair the fences of the Church-yard next adjoyning to the said Land: In this case it was said, that a Prohibition lies, and that it ought to be tried at Common Law, for that it is a charge to the Temporal Inheritance.

Mic. 15 Car. B. R. inter Homes & Good in per Cur. Pas. 37 El. B. inter Longley & Meredine. (16.) If the Parishioners sue the Church-wardens of the Parish in the Ecclesiastical Court to make an Account, and in that Suit costs of Suits are taxed for the Parishioners against the Church-wardens, and after the Church-wardens pay the costs to one of the Parishioners, and thereupon he that receives the costs gives a Release to the Church-wardens for the said costs, and that Release is after pleaded by the Church-wardens against other Parishioners in the Ecclesiastical Court, and they there disallow it; yet no Prohibition granted, for that they have cognizance of the Original, viz. the costs, they shall have cognizance also what shall be a sufficient payment thereof. And in this case a Prohibition was denied.

(17.) The Church-wardens cannot prescribe to have Lands to them and their Successours, for they are not any Corporation to have Lands but for Goods for the use of the Church. And therefore it seems at the Common Law, if a Feoffment be made to the use of the Church-wardens of *D.* it is a void use, for they have no capacity of such purchase.

38 El. Merthold and Winn's Case, cited by Coventry. (18.) The Church-wardens gift of Goods in their custody without the assent of the *Sidemen* or *Vestry*, is void. If a man take the Organs out of the Church, the Church-wardens may have Action of Trespafs for them, for the Organs belong to the Parishioners, and not

not to the Parson; therefore the Parson cannot sue him in the Ecclesiastical Court that takes them away. The Church-wardens by the assent and agreement of the Parishioners, may take a decayed Bell, and deliver it to the Bell-Founder, and that by their agreement he shall have 4*l.* for the casting thereof, and retain it until the 4*l.* be paid; and that agreement of the Parishioners shall excuse the Church-wardens in a Writ of *Account* brought against them by their Successours Church-wardens; for the Parishioners are a Corporation to dispose of such personal things as appertain to the Church.

Trin. 12 Jac.
B. R. per Cur.
Adjudged.
Mich. 37, 38.
Metbold and
Winn's Case.
ut supr. Ad-
judg'd.

(19.) B. Church-warden of the Church of S. was sued in the Ecclesiastical Court to account for the Monies which he had received and expended by reason of his Office the last year past, and for obtaining a Prohibition he suggested, that *per legem terræ*, he ought to account before the Minister of his Parish, the succeeding Church-wardens, and a great number of the Parishioners, and that he had accounted accordingly. Henden, the Ecclesiastical Judge *ex Officio* may compell him to account before him: I agree that Church-wardens for all personal things concerning the Church are a Corporation 8 E. 4. 6. and for Goods of the Church they may have Action, and count to the damage of the Parish, and the succeeding Church-warden may have Action against his Predecessour as against a stranger, but not as against an Officer for what he did *ratione Officii*, and then if he shall not be enforced to account in the Ecclesiastical Court, then there will be no remedy against him, *vid.* 12 H. 28. (2.) He is an Ecclesiastical Officer, and therefore proper to the Ecclesiastical Judge to have Jurisdiction of his account; And a Clerk of a Parish may sue in the Ecclesiastical Court for his Fees, which are called *Largitiones* (*charitativa*, *vid.* *Registr. f.* 52. for he is *quodammodo* an Officer Spiritual, 21 E. 4. 47. But notwithstanding this, a Prohibition was granted: And Mountague Chief Justice said, That a Church-warden is not an Ecclesiastical Officer, but Temporal employed in Ecclesiastical business; *Quare*, Whether in that case the Minister may require him to render an account? and if he refuse, Whether the Ecclesiastical Judge may compell him to account?

Hil. 16 Jac. B.
R. Bishop's Ca.
Roll's Rep.

(20.) In Trespas by Church-wardens, for taking a Bell out of the Church in the time of their Predecessours, it was adjudg'd, That the Action did lie, whereas it was declared *ad damnum ipsorum*, which shall be supposed *ad damnum Parochianorum*.

Hadman and
Ringwood's
Case. Cro.
p. 1.

(21.) The Parishioners of the Parish of *Al-Hallowes* in London, Warner's Case did prescribe to chuse their Church-wardens every year, and they chose W. their Church-warden; The Parson by virtue of a late Canon, that he should have the Election, chose C. to be Church-warden, and procured him to be sworn in the Ecclesiastical Court; and a Prohibition was prayed, for that it being a special custome the Canons

Warner's Case.
Cro. par. 2.

nons cannot alter it, and if every Parson might have Election of the Church-wardens without the assent of the Parishioners, they might be much prejudiced: And so it was said, That it had been Adjudg'd, *Pasch. 5 Jac.* in the case of the Parishioners of *Walbrook* in *London*.

Finch lib. 2.

c. 17. p. 179.

Roll's Cases.

par. 1. f. 393.

(22.) Although (as aforesaid) the Law doth make Church-wardens a kind of Corporation, and enables them by that Name to take moveable Goods and Chattels, and to sue and be sued at Law concerning such Goods for the use and benefit of their Parish; yet they cannot take an Estate of Lands to them by Name of *Church-wardens*; nor can Church-wardens prescribe to have Lands to them and their Successours, for they are no Corporation to have Lands, but for Goods of the Church only.

CHAP.

C H A P. XIV.

Of Consolidation, or Union of Churches.

1. Consolidation, what; whence so called; by whom, and in what cases it may be made.
2. The several kinds of Consolidation.
3. The reasons and grounds thereof in the Law.
4. The Requisites of Law in order to a Consolidation.
5. How Consolidation is practised here with us, and how in France.
6. The division or distinction which the Canon Law makes of Consolidation.

(1.) **C**onsolidation is the uniting, combining or consolidating of two Churches of Benefices in one^a. This cannot be done without the consent of the Bishop, the Patron and the Incumbent. This word thus used in an Ecclesiastical sense, takes its denomination from what the Civil Law intends by consolidating the Interest of Possession and Property together, which in that Law is called, *Consolidatio usufructus & proprietatis*; As when a man having the Usufruct of certain Lands by way of Rent, Devise or otherwise, doth then and at the same time purchase the Fee or Inheritance thereof; *hoc casu Consolidatio fieri dicitur. Instit. de Usufruct. §. 3.* So that in such Secular concerns, according to that Law, it properly signifies an uniting of the possession, occupation or profit with the property of the thing so prepossessed; which is sometimes called an *Unity of possession*, being a Joint-possession of two Rights in the same Person by distinct and several Titles. By the Statute of 37 H. 8. c. 21. it was lawfull to make an Union or Consolidation of two Churches in one, whereof the value of the one was not above six pounds in the King's Books of the *First-Fruits*, and not above one mile distant from the other. And by a late Statute of 17 Car. 2. cap. 3. it may be lawfull for the Bishop of the Diocese, Mayor, Bayliffs, &c. of any City or Town Corporate, and the Patron or Patrons, to unite two-Churches or Chapels in any such City, Town or the Liberties thereof; provided the Churches so united exceed not the annual value of an hundred pounds, unless the Parishioners desire otherwise. See the Statute at Large.

(2.) By this Consolidation or Union of Churches one of the Benefices become void, yea extinct in Law, *Illud enim quod Alteri unitur, extinguatur, neque amplius per se vacare dicitur. DD. in c. cum accessissent. de Consist. & Ludo. Gomez. in Regul. Cancell. Gall. de Trien.*

^a Broo: tit.
Union.
37 H. 8. c. 21.

37 H. 8. c. 21.
1 Ed. 6. c. 9.
17. Car. 2.
c. 3.

St. 17 Car. 2.
c. 3.

Trien. possess. q. 8. Jo. Andr. ad Clemen. 1. de Supplen. Neglig. Pralat. Again, the Law in express terms says, That *intereunt Beneficia Unionione, quando duo vel plura Beneficia in unum in perpetuum conjunguntur, c. Sicut unire de Excess. Pralat.* Of this consolidation or Union, the Law makes a threefold distinction, or it may be done three several ways in construction of Law, (1.) When one and the same person is set or appointed over two Churches. *Can. & temporis qualitas. 16. q. 1. c. 1. Ne Sede Vacante.* This with us amounts to a Plurality, but not unto a Consolidation or Union. (2.) When one Church is so united to another, that that which is united, *amittit jus suum, & eo utitur cui fit unio. c. Recolentes §. fin. de Stat. Monac. & Lindw. de Locat. & Conduct. c. licet glo. verb. Appropriationum.* (3.) When two or more Churches or Benefices are so united together, as that the one is not subject to the other, in which case *Quod melius est, retinetur. arg. c. Medicamentum. de pœnit. dist. 1. gl. in regu. 11. Cancell. Innoc. 8.*

(3.) There are several Causes or Reasons in the Law for this Consolidation, Incorporation, Annexation or Union of Churches; and they are chiefly these five, (1.) An unlawfull dividing of those Churches or Ecclesiastical Benefices, precedent to their reintegration or intended Consolidation, as when such as had been formerly united, were illegally divided. *Otho. Constit. Ne Ecclesia una, c. cum fit ars. gl. ib. in ver. reintegrentur.* (2.) For the better Hospitality, and that the Rector might thereby be the better enabled to relieve the Poor. *25. q. 3. posteaquam. §. his ita. & dict. gl. Otho. Constit.* (3.) The overnighness of the Churches each to other in point of Scituation, insomuch that one Rector may commodiously discharge the Cure of both, by reason of the vicinity of the places. *Arg. extr. de Præbend. c. Majoribus.* (4.) For or by reason of a want or defect of Parishioners, as when one of the Churches is deprived of her people by some incursion of an Enemy, or by some mortal Disease or Sickness, or the like. *11. q. 1. Unio. & gloss. ubi supra.* (5.) For and by reason of the extreme Poverty of one of the Parishes. *Extr. de eta. & qua. eam te. Extr. de Præbend. vacant. in fin. vid. Tholos. Syntagm. jur. lib. 17. cap. 5. nu. 7.* All which Causes or Reasons of Consolidation are enumerated out of the Canon Law by John de Aton in his gloss upon Cardinal Otho's Constitutions, and whatever other causes of Consolidation are asserted by the DD. may be all referr'd to one or other of the foresaid Reasons. Likewise, there are certain Solemnities required by the Canon Law, to be used and observed in the Consolidation and Union of Churches and Ecclesiastical Benefices, the impracticability whereof in this Realm, having otherwise provided in such cases, can have no such malignant influence in Law, as to invalidate the thing for want of some Circumstantials,

stantial, so long as there is a retention of Essentials, according to the Laws and constitutions of this Kingdom. *Unio facta ab Episcopo, debet intervenire Consensu Capituli sui. Clem. si Una de reb. Eccl. non. aliend. Item requiritur Consensus Patroni. Clem. in agro. §. ad hoc de Stat. Mona. Item nullum habet effectum vivente Beneficiario. Card. Zab. in dist. Clem. Si una, &c. Item, verus valor Beneficiorum Exprimi debet, &c.*

(4.) In all Consolidations regularly there ought to be *Causa Necessitatis vel Utilitatis*: Also the just and true value of the Benefices ought to be known, as well of that which is to be united, as of that to which the other is unitable; in order whereunto there ought to issue a Commission of Enquiry touching the said cause and value, at which all persons pretending interest, are to be or may be present upon Summons or Notice thereof timely given them to that end; for no Consolidation or Union of that kind ought to be made *non vocatis vocandis*. Rebuff. Resp. 195.

(5.) This Form touching Consolidations and Union of Churches and Ecclesiastical Benefices is practised in *France*; which, though there appears nothing therein but what seems consonant to reason, yet the Statute-Laws of this Realm have herein made other provision in this matter: And that which we now commonly call *Consolidation*, the Canon Law, which is best and most properly acquainted with this matter, calls *Union*; Touching which there are in use and practice many things in divers Nations and Countries, which were *Incognita* to the Interpreters of that Law, and not in all things consonant to each other; thereby rendring this subject the more perplexed by reason of the several modes of practice, diversified according to the various Constitutions of several Nations respectively; for which reason the Interpreters of the Canon Law are the less positive in reducing the state of this Matter to such a point of certainty, as may be said infallible in Law, onely they all agree in some certain Essentials to an Union, as also (for the most part) in this Definition thereof, *viz. That Unio est Beneficiorum seu Ecclesiarum ab Episcopo, vel ab alio Superiore facta annexio.* To which this also may be added by way of description, though not by way of definition, That *quando fit unio, Ecclesia in proprietatem concedi solet. Cap. incur. de jur. Patronat.* and it must be *Unio Beneficiorum*, for there cannot be an Union unless there be *plura Beneficia* in the case. *L. 1. & per totum. ff. de Optio Legat.* Also it is *Beneficiorum seu Ecclesiarum*, because the word [*Benefice*] is in it self a general term comprehending all Benefices, great and small, Regular and Secular, Dignities, and Offices: *C. 1. de reg. jur. in 6. c. extirpanda §. qui vero. de Præbend.* So that Bishopricks, as well as other Benefices, may be united and annexed; But a Bishoprick, which the Law calls *culmen Dignitatis*,
L I

is, doth not regularly fall under the name or notion of *Benefice*: c. *pen. de Prabend.* and yet two Bishopricks may be united. c. *Detimau, & seq. 16. q. 1.* Rebuff. *de Union. Benefic. nu. 4, 5.*

(6.) This Consolidation or Union at the Canon Law, is either *Perpetual* or *Temporal*; if *Perpetual*, then it must be so expressed in the Union, that *in perpetuum univimus*: c. *exposuisti, de Prab.* if *Temporal*, then it is onely for his life in whose favour the Union is made, c. 1. *ne Sede vacante*, and at his death it expires, c. *quoniam Abbas, de Offic. Delegat.* But the Practice with us knows nothing of the *Temporal* Member of this distinction; nor is the practice thereof at this day received in France, Rebuff. *ubi supr. nu. 6.* such *Temporal* Unions being onely in *contemplatione persone, non Ecclesie*, whereas the Law is, *Ecclesia magis favendum est, quam persone.* Dic. c. 1. & c. *requisisti, de testa. & Oldr. Concil. 257.* And where two Parochial Churches are consolidated or united, that Church to which the other is united shall be the Superiour and principal, the other which is united, is the Inferiour and Accessory, yet shall enjoy the Privileges of that Church to which she is united. c. *recolentes, in fin. de stat. Monach.* Lastly, The more worthy *Benefice* is never united to the *minus digno*, and therefore a Parochial Church may not be united to a Chapel, *sed è contra.* Sic. c. *exposuisti, de Prabend.*

CHAP. XV.

Of Dilapidations.

1. What Dilapidation signifies; how many ways it may happen; the Remedies in Law in case thereof; and to what Court the cognizance thereof properly belongs.
2. Provisions made by the Canon for prevention of Dilapidations.
3. Dilapidation twofold in construction of Law; An Exposition of the said Canon; the Bishop's power of Sequestration in case of Dilapidation.
4. By whom the Body of the Church, and by whom the Chancel shall be kept in Repair; How the charge of Repair in the case of Dilapidations shall be apportioned; and what the Law in such cases, where one Parish is divided into two.
5. Dilapidation of Ecclesiastical Edifices, a good cause in Law of Deprivation.
6. The Injunction of King Ed. 6. for prevention of Dilapidations.
7. Leases made by a Parson, void by Statute for Non-residence, to prevent Dilapidations.
8. The wasting the Woods of a Bishoprick, a Dilapidation in Law; such Woods being the Dower of the Church.
9. A Vicar felling down Timber Trees and Wood in the Church-yard, is a Dilapidation, and good cause of Deprivation.

(1.) **D**ilapidation is the Incumbents suffering the Chancel or other the Edifices of his Ecclesiastical Living to go to ruine or decay, neglecting to repair the same; It extends also to his committing or suffering to be committed any wilfull Waste in or upon the Glebe woods or other Inheritance of his Church. Against which provision is made by the Provincial Constitutions, whereof Sir *Simon Degge* takes notice in his *Parson's Counsellour* ²; ¹ *Parf. Counf.* though in truth the Canon there provides rather as to satisfaction ^{par. 1. cap. 2.} for, than prevention of such Dilapidations. *Lindw. c. si Rector alicujus Ecclesia*, & gloss. *ibid.* But the Canon Law is expresse and full in all respects relating to this implicit Sacrilege, nor doth the Custome of England or the Common Law leave the Church without sufficient Remedy in this case, albeit it postpones the satisfaction for damages for Dilapidations to the payment of Debts, as the Canon Law prefers it before the payment of Legacies. Sir *Simon Degge* in the forementioned place makes mention of the In-

- hibition out of *Chancery* to the Bishop of *Durham* by order of Parliament in *Edward the First's* time, for wasting the woods belonging to that Bishoprick ^b. Also of the Archbishop of *Dublin's* being Fined three hundred Marks for disforesting a Forest belonging to his Archbishoprick ^c. Likewise, that by Books of the Common Law, a Bishop, &c. wasting the Lands, Woods or Houses of his Church, may be depofed or deprived by his Superiour ^d. And in case any Parson, Vicar, &c. shall make any conveyance of his Goods, to defraud his Successour of his Remedy in case of Dilapidations; in that case it is provided by the Stat. of 13 *Eliz.* c. 2. that the Spiritual Court may in like manner proceed against the Grantee; as otherwise it might have done against the deceased Parson's Executors or Administrators ^e: and all such Grants to defraud any person of their just action, were made void by a later Statute ^f. It is agreed, That the cognizance of *Dilapidations* properly and naturally belongs to the Ecclesiastical jurisdiction, and no Prohibition to lie in the case; or if such happen to be granted, then the same to be superfed by a Consultation ^g: yet it seems Action upon the Case grounded upon the custome of *England*, hath been brought in this case at Common Law, and Damages recovered ^h. It is also enacted by the Statute of 14 *Eliz.* That Monies recovered upon damages for Dilapidations, shall be expended in and upon the houses, &c. dilapidated ⁱ.
- ^a Co. 11. 49. 2.
^c Rot. Pasc.
^d 14 H. 3. m. 3.
^e 20 H. 6.
^f 46. 2.
^g 2 H. 4. 3. b.
^h Co. 11. 94. b.
ⁱ 29 E. 3. 16. a.
^j 9 E. 4. 34. a.
^k St. 13. El.
^l c. 2.
^m St. 13. El.
ⁿ c. 5.
^o F. N. B.
^p 51. f.
^q Vid. Parf.
^r Counf. par. 1.
^s cap. 8.
^t St. 14. El.
^u c. 11.

(2.) Cardinal *Othobon* in his Canon [*De Domibus Ecclesiarum reficiendis*] hath constituted and ordained, that all such Ecclesiastical persons as are Beneficed, take special care, that from time to time they sufficiently repair the Dwelling-houses and other Edifices belonging to their Benefices as oft as need shall so require; unto which duty they are earnestly and frequently to be exhorted and admonish'd, as well by the Diocesans as by the Archdeacons. And if they shall for the space of two months next after such Monition neglect the same, the Bishop of the Diocese may from thenceforth cause it to be effectually done at the Parson's charge out of the profits and fruits of his Church and Benefice, taking onely so much and no more as may suffice for such Repairs; And the Chancels of Churches to be in like manner repair'd by those who are obliged thereto. And as to Archbishops, Bishops and other inferior Prelates, they are by the said Canon enjoyn'd to keep their Houses and Edifices in good and sufficient Repair, *sub divini Judicii attestazione*. *Constit. Othobon. de dom. Eccl. refic. Sub divini Judicii attestazione (h. e.) damnationis eterne in extremo Calculo. glo. in ver. Sub divini Const. Othobon. de resident. Archiepisc.*

(3.) By the Gloss on that Canon it is inferr'd, That a Parson may be guilty of Dilapidations, or of a Neglect in that kind two ways;
viz.

viz. either by not keeping the Edifices in good repair, or by not repairing them being gone to decay. That *Canon* chiefly refers to the Mansion-houses of all Benefices Ecclesiastical, and that not onely of all Parsonages and Rectories, but also of all Bishopricks, and of all Curates and Prebends, and of all others having Ecclesiastical Livings; But not specially (by the words of this *Canon*) unto their Farm-houses, though they also are by the Canon Law provided for in case of *Dilapidations*. And such as neglect the Reparations aforesaid, may be accused and convicted thereof before the Diocesan, who hath power to sequester the Fruits of such Benefices for the Reparations aforesaid. *Gloss. in ver. cessaverit in dict. Can.* such fruits thereof being in construction of Law, as it were tacitly hypothecated by a certain kind of Privilege for such Indemnity; and for that reason the Bishop in some cases may for that end sequester the same.

(4.) And whereas in the abovesaid *Canon* it is said, That *Chancels* shall be kept in repair by such as are thereunto obliged, it is to be understood, that that is spoken by way of allusion to the common custome in *England*, whereby the Body of the Church is usually repaired by the Parishioners, and Chancels by the Rectors, who notwithstanding ought to be at the care, though not at the costs of the other also; he being annually accountable to the Bishop for the same, if the Bishop so please; for which reason the Rector hath power to audit the Accounts of the costs and charges about the same, as also what shall be given or bequeathed by way of Legacy for that end and purpose. And where this custome prevails, that the Parishioners shall repair the Body of the Church, it is not to be understood, that this is incumbent on them as a *Real*, but as a *Personal* duty or burthen; yet every Parishioner proportionably to that quantity of Land which he holds within the Parish and number of Cattel he feeds on the same: *Gloss. ibid. in ver. ad hoc tenentur.* And in case one Parish be by legal Authority divided into Two, in that case, if such division were made by and with the consent of these Four, *viz.* the Bishop, the Patron, the Parson, and the Parishioners, then the more Ancient Church shall not contribute to the Reparations of the New, for that now they are two distinct Parishes. *Gloss. ibid.*

(5.) Sir *Ed. Coke* in the third part of his *Institutes*, having spoken of erecting of Houses and Buildings, &c. tells us what he finds in the Books of the Common Law and Records, touching *Dilapidations* and decay of Building, and having Margined as here in this Margent, says, That Dilapidation of Ecclesiastical Palaces, Houses and Buildings is a good cause of Deprivation.

Co. Inst. par.
3. cap. 97.
29 E. 3. 16.
2 H. 4. f. 3.
9 E. 4. 34.

(6.) By

(6.) By the Injunctions of King Ed. 6. An. 1547. to all his Clergy it is required, *That the Proprietors, Parsons, Vicars and Clerks, having Churches, Chapels or Mansions, shall yearly bestow upon the same Mansions or Chancels of their Churches being in decay, the fifth part of their Benefices, till they be fully repaired; and the same so repaired,*

* Bp. Sparrow's Collect. of Articles, Cyc. par. 5.

shall always keep and maintain in good estate. Consonant to which is the Thirteenth Article of Queen Elizabeth's Injunctions given to all the Clergy, An. 1559.

Hill. 31 Eliz. B. R. *Mott & Hale's Case.* Cro. pa. 1.

(7.) The Case was, where the Parson made a Lease to the Plaintiff for 21 years after the Statute of 13 Eliz. of Lands usually Lett, rendring the ancient Rent, the Patron and Ordinary confirmed it, the Lessee let part of the term to the Defendant, the Parson died, the Successour entred and leased to the Defendant; against whom the Lessee brought Debt upon the former lease, who pleaded the Statute of 13 Eliz. which made all Leases void, where the Parson is not resident, or absent for 80 days: It was Adjudged, That the Lease was void by the death of the Incumbent; for the Justices said, the Statute doth provide against *Dilapidations*, and for maintenance of Hospitality; and therefore provided the Leases shall be void not onely for *Non-residence*, but by death or resignation, for otherwise *Dilapidations* should be in the time of the Successour, and he cannot maintain Hospitality.

What Timber a Bishop may sell, and for what purposes.

(8.) The wasting of the Woods belonging to a Bishoprick, is in the Law understood as a Dilapidation, as was formerly hinted: Note, By Coke chief Justice, a Bishop is onely to sell Timber for Building, for Fuel, and for his other necessary occasions, and there is no Bishoprick but the same is of the Foundation of the King; the Woods of the Bishoprick are called the *Dower* of the Church, and these are always carefully to be preserved; and if he sell and destroy this, upon a motion thereof made to us (says the Lord Coke) we will grant a Prohibition: And to this purpose there was a great Cause which concerned the Bishop of *Duresm*, who had divers *Cole-Mines*, and would have cut down his Timber-Trees for the maintenance and upholding of his works; and upon motion in Parliament concerning this, for the King, Order was there made, that the Judges should grant a Prohibition for the King, and we will here (says he) revive this again, for there a Prohibition was so granted. And so upon the like motion made unto us in the like case, we will also for the King grant a Prohibition by the Statute of 35 E. 1. If a Bishop cut down Timber-Trees for any cause, unless it be for necessary Reparations (as if he sell the same unto a stranger) we will grant a Prohibition: And to this purpose I have seen (said he) a good Record in 25 E. 1. where complaint was made in Parliament of the Bishop of *Duresm* (as before) for cutting of Timber-Trees for

for his Cole-Mines, and there agreed that in such a case a Prohibition did lie; and upon motion made a Prohibition was then granted: Mich. 12 Jac. and the reason then given, because that this Timber was the Dower of the Church; and so it shall be also in the case of a Dean and Chapter; in which cases, upon this ground we will grant (as he said) Prohibitions; and the whole Court agreed with him herein. Also in *Sakar's* case, against whom Judgment being given for *Simony*, yet he being by assent of parties to continue in the Vicarage for a certain time, this time being now past, and he still continuing in possession, and committing of great waste, by pulling down the Glass-windows, and pulling up of Planks, the Court granted a Prohibition, and said, That this is the Dower of the Church, and we will here Prohibit them; if they fell and waste the Timber of the Church, or if they will pull down the houses: And Prohibition to prevent Dilapidations and to stay the doing of any Waste, was in that case awarded accordingly.

Mich. 12 Jac.
B. R. *Chapman* ver. *Jane Barnaby*.
Bulstr. Rep.

Mich. 13 Jac.
B. R. *The King* ver. *Sakar*.
Bulstr. par. 3.

(9.) In a Prohibition, the case was this: A Vicar lops and cuts down Trees growing in the Church-yard; the Church-wardens hinder him in the carriage of the same away, and they being in Trial of this Suit: The Church-wardens by their Council, moved the Court for a Prohibition to the Vicar, to stay him from felling any more. *Coke* Chief Justice, This is a good cause of Deprivation, if he fell down Timber-Trees and Wood, this is a *Dilapidation*; and by the Resolution in Parliament, a Prohibition by the Law shall be granted, if a Bishop fells down Wood and Timber-Trees. The whole Court agreed clearly in this, to grant here a Prohibition, to the Vicar to inhibit him to make spoil of the Timber, this being (as it is called in Parliament) the Endowment of the Church. *Coke*, we will also grant a Prohibition, to restrain Bishops from felling the Wood and Timber-Trees of their Churches. And so in this principal Case, by the Rule of the Court a Prohibition was granted.

Mich. 13 Jac.
B. R. *Knowell* and *All*, ver. *Harvey*.
Bulstr. par. 3.

CHAP.

CHAP. XVI.

Of Patrons, & de jure Patronatus.

1. *What Patron properly signifies in the Law; the Original thereof; and how subject to corruption.*
2. *In what case the Bishop may proceed de jure Patronatus, and how the Process thereof is to be executed.*
3. *How the admittance ought to be, in Case the same Clerk be presented by two Patrons to the same Benefice.*
4. *In what cases of Avoidance, Notice thereof ought to be given to the Patron; and what course in that case the Bishop is to take, in case he knows not the true Patron.*
5. *Several Appellations in Law, importing Patron.*
6. *How many ways a Church may become Litigious.*
7. *Whether an Advowson may be extended?*
8. *In what case the Patron may present, where the King took not his turn upon the first Lapse.*
9. *A Patron may not take any Benefit of the Glebe during a Vacancy.*
10. *In what case the Patron shall not by bringing the Writ of Qu. Imp. against the Bishop, prevent the incurring of the Lapse to the Ordinary.*
11. *The King is Patron Paramount; and the Patron of all the Bishopricks in England: The Charter of King John, whereby Bishopricks from being Donative became Elective.*

(1.) **PATRON**, by the Canon Law, as also in the Feuds, (wherewith our Common Law doth herein accord) doth signifie a person who hath of right in him the free Donation or Gift of a Benefice, grounded originally upon the bounty and beneficence of such as Founded, Erected or Endowed Churches with a considerable part of their Revenue. *De Jur. Patronat. Decretal.* Such were called *Patroni à Patrocinandi*, and properly, considering the Primitive state of the Church; but now according to the mode of this degenerating Age, as improperly, as *Mons à movendo*; for by the Merchandize of their Presentations they now seem, as if they were rather the *Hucksters* than *Patrons* of the Church. But from the beginning it was not so, when for the encouragement of Lay-persons to works of so much Piety, it was permitted them to present their Clerks where themselves or their Ancestours

Ancestors had expressed their Bounty in that kind; whence they worthily acquired this Right of *Jus Patronatus*, which the very Canon Law for that reason will not understand as a thing merely Spiritual, but rather as a Temporal annexed to what is Spiritual: *Quod à Supremis Pontificibus proditum est, Laicos habere Jus Præsentandi Clericos Ordinariis: hoc singulari favore sustinetur, ut allestentur Laici, invitentur, & inducantur ad constructionem Ecclesiarum. Nec omni ex parte Jus Patronatus Spirituale censeri debet, sed Temporale potius Spirituali annexum.* Gloss. in c. *piæ mentis*, 16. q. 7. Coras. ad Sacerdot. mater par. 1. cap. 2. Yet not Temporal in a Merchandable sense, unless the Presenter and Presentee will run the hazard of perishing together; for prevention whereof, provision is made by that Solemn Oath enjoyn'd by the Fortieth Canon of the Ecclesiastical Constitutions; whereof there was no need in former Ages less corrupt, when instead of selling Presentations they purchased Foundations; and instead of erecting Idol-Temples (for Covetousness is Idolatry) they Founded, Built, and Endowed Churches for the Worship of the True God. *Patroni in jure Pontificio dicuntur, qui alienjus Ecclesiæ extruendæ, &c. Autores fuerunt, ideoque Præsentandi & Offerendi Clericum jus habent, &c. Acquirunt autem hoc jus, qui de Episcopi consensu vel fundant Ecclesiam, vel adificant, vel ante Consecrationem dotant, ut non valde sit Obscurum, Jus Patronatus, &c. Jus esse Præsentandi Clericum ad Ecclesiam Vacantem ex gratia ei Concessum, qui Consentiente Episcopo, vel Construxit, vel dotavit Ecclesiam.* Corasius ibid par. 4. cap. 6. And it is gratefully provided by the Canon Law, if a Patron or his Posterity being Patrons, do fall to decay, the Incumbent of the Fruits of the Church by Compulsary censure of the Ordinary, according to that Law, is to be enforced to make Contribution to them: For which reason it is, that the Law holds *Utilitas* to be one of the three fruits or effects of a Patronage, viz. *Honos, Onus, Utilitas.*

(2.) If two Patrons, both pretending to the same Church, present unto the Ordinary their Clerks respectively, who insist on their Admission, and the Bishop by admitting the one rejects the other, he that is rejected, at least his Patron, may have his Action against the Bishop, not in the Ecclesiastical, but Temporal Court, by a *Quare Impedit*, or the like. In such cases therefore the Bishop is wont to decree a Process commonly called *Negotium de Jure Patronatus* (that is) A day fixed and certain is appointed by the Bishop to sit in the Church that is void, and a Monition decreed to be served on the Patrons presenting, and the Clerks presented, then and there to be present, to see proceedings in the said business according to Law,

* 22 H.6.29.b
If they refuse,
being duly
Summoned to
Appear, the
Commissioners
of the Bishop
may Proceed a-
gainst the Cler-
gy-men by Se-
questration, and
the Lay men by
Ecclesiastical
Censures.

† It is an In-
quest of Office
in nature of a
Writ de propri-
etate probanda,
and doth not
bind the parties
Right and Title

to which end a Citation issues to * Twelve persons, whereof six of the Clergy, and six of the Laity, all of the Neighbourhood of the said vacant Church, to be then and there also present by way of an Enquest, and on their Corporal Oaths to enquire on certain Articles, then ministred to them, touching the right of Presentation to the said Benefice. These Articles consist chiefly of these Four heads, viz. (1) Who last presented to the said Church when it was last void, as also for the last two or three times when it was void. (2) Whether the person or persons who last presented, or these last two or three times or turns, at the time and times of Vacancy of the said Church, did present in his or their own proper right and title. (3) Whether either of the Clerks now presented be known or suspected of any Notorious crime, or of Heresy, Simony, Perjury, Adultery, or Drunkenness. (4) Whether either of the Clerks now presented hath given or promised, either by himself, or any other for him and in his name, or by or with his consent or knowledge, any Money or other gratuity directly or indirectly, for obtaining of his Presentation to the said Benefice, to the Patron thereof, or to any other who presented the said Clerk, or caused him to be presented. On which Articles if it be found by the Verdict of the said Jury, that such or such of the said Patrons was in the possession of the Presentation at that time when the Church was last void, then is his Clerk to be admitted, if there be no other legal impediment to hinder it, that is, nothing to affect him with, contained in the third or fourth last precedent Articles.

(3.) If two Patrons, each pretending a right of title to the Presentation, shall present one and the same person severally to the Bishop to be Admitted and Instituted to the Church; the Bishop cannot Admit him generally, but must in his Admittance of the Incumbent, admit him Incumbent of the Presentation only of one of them: And if they make such several Presentations, claiming by several Titles, the Bishop is to direct this Writ *de Jure Patronatus*; for that in such case the Church is become *Litigious*; yet the Bishop is not to award the said Writ, but at the instance and request of the said parties. And here *Q.* at whose charge the said Writ of *Jure Patronatus* shall in this case be sued forth, whether at the charge of the Bishop, or of the parties: for that the old Books (as the Reporter gives us to understand) do differ in this point. *Micb. 8. Jac C. B. in Danby and Linley's Case. Vid. 7 Ed. 4. Quare Imp. 100. 34 H.6.41. 21 H.6.43. and 22 H.6.28.* It is supposed (and commonly practised) it is sued at the instance and cost of one of the parties, or of both if they joyn. *35 H. 6.18.b.19.a. 34 H. 6. 12. a Hob. 317. 34 H. 6. 38.5 H.7.22.a.*

(4.) Suppose that a Parson be deprived by the Ordinary, or reads not his Articles; In which cases the Church is void, yet notice must be given to the true Patron for that time, or else the Lapse incurs not (which is inconvenient for the Church, and a prejudice to the Ordinary) for how shall he in this case assure himself of a sufficient Notice? For if he give notice to him that is not Patron, for this very turn, his notice is vain, and the true Patron perhaps knows not of the Deprivation, or if he knows it, needs not Present without notice given him. In this Case Sir H. Hobard Chief Justice holds, That his way is to award a *Jure Patronatus* with solemn Premonitions *Quorum Interest*; And then enquiry being made who is Patron, to give him Notice, and if he Presents not within six months, then the Ordinary may Collate, though that shall not bind the very Patron, yet it shall excuse the Bishop from Disturbance upon Special matter shewed: But if the other supposed Patron present, and the six months incur, *Quare* if the true Patron be bound, since there was no Notice given him. And the Opinion of *Hob.* is, that though without Notice the Patron is not bound by the Lapse, yet that is nothing to save the Usurpation of another pretended Patron, who is not subject to give Notice (a). Also if a Suit be depending between Two parties touching the right of Presentation, and it be not determined within six months, the Bishop may present by Lapse, and he that hath right to Present, shall recover his Damages, as by the Statute appears (b).

(5.) The Patron or he that hath right to Present to a Benefice, is sometimes termed *Advowe*, alias *Avowe* (*Advocatus*) (c). There is also *Advowe Paramount*, or the highest Patron, which is meant only of the King. *Advocatus est ad quem pertinet jus Advocationis alicujus Ecclesie, ut ad Ecclesiam Nomine proprio non alieno, possit Prasentare* (d). Britton saith, That *Avowe* is he two whom the right of Advowson of any Church appertains; so that he may present thereunto in his own Name: And is called *Avowe*, for a difference from those that sometimes present in another mans Name, as a Guardian that presents in the name of his Ward; and for a difference also from those who have the Lands to which an Advowson appertains but only for term of their lives or of years, by Intrusion or Discontinuance (e).

(6.) A Church may become Litigious both before, and by *£* and after a *Jure Patronatus*: Before, as by a plurality of Presentations: By, as when in case of plurality of Presentations upon a plural *Jure Patronatus* the one Jury gives a Verdict for the Title of one Patron, the other for the Title of the other Patron: After, as when after a *Jure Patronatus* awarded, and Verdict thereupon given for one of the parties, a third person presents before Admittance of his Clerk

(a) Pasch. 17.
Jac. C. B. Rot.
827. Case Sir
W. Elvis vers.
Archbishop of
York, and Hob.
Rep.

(b) St. westm.
2. cap. 5. *Terms*
of Law. verb.
Quare Impedit.
(c) 25 Ed. 3. 5.
(d) Fleta, l. 5.
cap. 14.
F.N. B. fo. 39.

(e) Britton.
cap. 29.

41 Il. 6. 45. a

(f) *Callis*

Read. 3.

21 H. 6. 44. a.

Sed *Quere.*

21 H. 6. per

Newton and*Paston.*

(g) 21 H. 6. 44.

Callis Read-

ing 29.

Hob. 319.

(h) 34 H. 6.

40. a.

(i) Hob. 317.

for whom the Verdict was given. Upon a plural *Jure Patronatus* if one Jury give the Verdict for the Title of the one, the other for the Title of the other Patron, it is conceived in that case the Ordinary may refuse the Clerks of both Patrons, and suffer the Church to Lapse (f). And where a Third person presents after a Verdict, as aforesaid, but before the Clerk be Admitted, whereby the Church becomes Litigious *de Novo*, in that case the Bishop may award a new *Jure Patronatus*. Also if the Bishop doubts the Patrons Title that presents, he may (as some conceive) award a *Jure Patronatus*, albeit the Church be not Litigious (g); which is a safe way for prevention of any surprize to the rightful Patron or other pretenders, in which case if the Right of Patronage be found for another that had not before presented, his Clerk may be admitted by the Ordinary (h); who is no Disturber if he admit a Clerk that is presented before the Church becom Litigious by a second presentation (i); for by the Verdict of the Jury aforesaid, he is sufficiently warranted to admit and institute the Clerk for whose Patrons Title the Verdict is given, in doing whereof he is no Disturber, albeit the other Patron, against whom the Verdict is given, should after recover in a *Quare Impedit*. And after a Verdict in a *Jure Patronatus* found for a Patron, he ought to renew his Request to the Ordinary for the admission of his Clerk; otherwise the Bishop may Collate, in case the Church Lapse after Six months.

(7.) Sir *John Arundel* and his Wife brought a *Quare Impedit* against the Bishop of Gloucester and others, who pleaded in Bar, that *William Sturton* was seized of a Manor to which the advowson was appendant, and bound himself in a Statute-Merchant of 200l. to one *Lorg*, and the Statute was extended, and conveyed the interest of the Statute to one of the Defendants, and then the Church became void: And by the Court the Advowson may be extended, and it it become void during the Conufees estate, the Conufee may present (k).

(k) Mich. 32.

& 33 Eliz.

Sir *Jo. Arundel's* Case.

Pol. Case

Kent v. c. f.*Whitchal*, in*Owen's* Rep.

(8.) In *Beverley's* Case against the Archbishop of *Canterbury*, where the question was whether the Queen might take her turn to Present, in regard she took not her turn when the first Lapse hapned immediately at the first Avoidance, by reason of the Incumbents having Two Benefices, within the Stat. of 21 H. 8. And all the Justices of the Common Pleas after long and serious debate, did Resolve, That the Queen shall not now have her Presentation, but the Patron; because the Queen hath such Presentment by Lapse as the Bishop had, and no other, and could present but to the present Avoidance then void: And although *Nullum tempus occurrit Regi*, yet we must distinguish it thus; for where the King is limited to a time certain, or to that which in it self is Transitory, There the King

King is to do it, within the time limited, or in that time wherein the thing to be done hath Essence or Continuance, or while it remaineth, for otherwise he may not do it afterwards: So where a Second presentment is granted to the King, and he does not Present he may not after (l).

(9.) During a Vacancy the Freehold of the Glebe is in *Absentance* (m), and not in the Patron (n); who can take no benefit thereby in that time (o), nor can he have any action for Trespas done thereon in the time of such Vacancy (p); Yet if a man hath an Annuity out of a Parsonage, and he in the Vacancy thereof Release to the Patron, it shall extinguish the Annuity. 21 H. 7. 4. 1. Co. 5. Forde, 81. b.

(l) Beverly against the Archbishop of Canterbury. Owen's Rep. (m) Littl. 144. (n) 8 H. 6. 24. b. (o) Ibid. (p) 11 H. 6. 4. b.

(10.) If a Church becomes void by the death of the Incumbent, or otherwise, and the Patron within Six months bring a *Quare Impedit* against the Bishop, and then Six months pass without any Clerk presented by the Patron to the Bishop; in that case the Lapse shall incur notwithstanding the pendency of the Writ; for it is not reasonable that the Ordinary should lose his Title of Lapse without any wrong done by him, by a fraudulent action brought without cause by the Patron, and whereby the Ordinary is put to Expences without cause, and by such fraudulent means the Patron might keep the Church perpetually void. *Hob. Rep.* 270 & *Roll. Abr. verb. Presentment, lit. X. pag. 366.*

(11.) The *Jus Appellandi* in defect of Justice, and the *Jus Præsentandi* in case of Lapse, seem to have a parallel resemblance with one another in their gradations; for as they both primarily meet in the Ordinary, so they both pass from him to the Metropolitan, and from him to the King, not only as Supreme Ordinary, but also as Patron Paramount of all the Bishopricks in England; which, as they were originally Donative per *Annulum & Baculum*: so now since King *John's* time, they are by Canonical Election; for King *John* by his Charter dated the 15th of January in the 16th year of his Reign, granted this privilege to the Church in these words, viz. *Quod qualiscunque Consuetudo temporibus Prædecessorum nostrorum hactenus in Ecclesia Anglicana fuerit observata, & quicquid juris nobis hactenus vindicaverimus, de cætero in universis & singulis Ecclesiis & Monasteriis, Cathedralibus & Conventualibus totius Regni Angliæ, Libera sint in perpetuum Electiones quorumcunque Prælatorum, majorum & minorum, Salvo Nobis & heredibus nostris Custodia Ecclesiarum & Monasteriorum vacantium, quæ ad nos pertinent. Promittimus etiam quod nec impedimus nec impediri permittemus per Ministros nostros, nec procurabimus, quin in universis & singulis Monasteriis & Ecclesiis, postquam vacuerint Prælatura,*

latura, quemcunque voluerint Libere sibi præficiant Electores Pastorum, petita tamen à Nobis prius & hæredibus nostris Licentia Eligendi, quam non denegabimus nec differemus. Et similiter, post celebratam Electionem, nosse requiratur Assensus, quem non denegabimus, nisi adversus eandem Rationale proposuerimus, & legitime probaverimus propter quod non debemus consentire, &c. Vid. Davis Rep. in the case of Præmunire, fo. 92, 93.

C A H P. XVII.

Of Parsons and Parsonages.

1. Parson, what he is in the intendment of Law.
2. What is meant by Parson imparsonce.
3. The Freehold of Church and Glebe is in the Parson: what interest he hath in the Church-yard, and the Trees there growing; and whether he hath any in the Bells or Ornaments of the Church?
4. How he must be qualified that will be a Parson; and who is rendered incapable of being such.
5. Whether the Parson may demand any thing by Custom, upon the Burial of one who dying in his Parish, was Buried elsewhere.
6. The words Parsonage, Church, Rectory, frequently used Synonymously; Pensions of Ecclesiastical cognizance.
7. A case in Law touching a Parsons Obligations for Resignation.
8. Whether a Parsons acceptance of Rent makes his Predecessor's Lease good.
9. Prohibition to the High Commissioners of York, touching Articles exhibited before them against a Parson.
10. A Case in Law touching the Confirmation of a Lease made by a Parson.
11. Other Cases at the Common Law, relating to Parsons.
12. The Patron nothing to do in the Church during Plenary.
13. By what words a Resignation of a Parsonage may be, or not.
14. Whether the Resignation of a Donative may be to the Donor, or how it may be departed with?
15. Whether the Parson may appoint the Parish Clerk?
16. A Bishop, Archdeacon, and Parson, are Spiritual Corporations and have a double Capacity.
17. All differences between Parsons and Vicars concerning the endowment of the Church, are cognizable in the Ecclesiastical Court.
18. Priviledges of the Clergy.

(1.) **T**Here is Parson [*Persona*] and Parson imparsonce [*Persona impersonata*:] Parson properly signifies the Rector of a Parochial Church; because during the time of his Incumbency he
 repre-

(a) Vid. *Fleta*.
lib. 9. cap. 18.

represents the Church, and in the eye of the Law sustains the *person* thereof, as well in Suing, as in being sued in any action touching the same (a.) Originally the Parson was he that had the charge of a Parochial Church, and was called the Rector of that Church, but it seems he is most properly so called, that hath a Parsonage where there is a Vicarage Endowed. And yet it is supposed that *Parsona* is the Patron, or in whom the Right of Patronage is, for that before the *Lateran* Council he had Right to the Tithes, in regard of his having erected and endowed the Church which he had Founded. The Pastors of Parishes are called Rectors, unless the *Parochial* Tithes be Impropriated; and then they are called Vicars, *Quasi vice fungentes Rectorum*: And Curates are they who for certain Stipends assist such Rectors and Vicars, that have the care of more Churches than one.

(b) N. B. of
Entries, verb.
Aid in Annuity.

(c) Register
Judicial. fo. 34. b.

(d) Dyer fo. 40.
nu. 72.

(e) Idem, fo.
221. nu. 19.

(f) Vid. Co.
on Litt.
fo. 300. b.

(2.) *Parson impersonae*, is he that as lawful Incumbent is in actual possession of a Church Parochial, and with whom the Church is full, be it Presentative or impropriate (b); and seems also to be that person to whom the Benefice is given in the Patrons Right; for in some Books *Persona impersonata* is taken for the Rector of a Benefice Presentative and not Appropriated (c): Yet Dyer saith, That a Dean and Chapter are Parsons *Impersonae* of a Benefice appropriated to them (d); and in another place plainly sheweth, That *Persona impersonata* is he that is Inducted and in possession of a Benefice (e). So that *Persona* seems to be termed *Impersonata*, only in respect of the possession which he hath of the Benefice or Rectory, be it Appropriate or otherwise by the Act of another (f).

(g) Vid. 28.
H. 6. 19. by
Marcham,
(h) 13 R. 2.
Fitzh. tit.
Jurisdiction, 19.

(i) 11 H. 4. 12.
& 17 H. 3.
Prælib. 26.

(3.) The Parson hath a Right unto the possession of the Church and Glebe, having the Freehold in himself, and may receive the Profits, Tithes, Oblations, Obventions, and Offerings to his own use, without the Patrons or Ordinaries consent, who without his consent and agreement can do nothing during his Incumbency to charge the Church or his Successors. And not only is the Freehold of the Church in the Parson, but he hath also the Right of the Church-yard and Glebe in him, whereof if he be put out of possession, or disseised, he may have an Assize (g). Or if he be ejected he may have Trespass, and so may the Vicar have against a Stranger, if he be disseised of the Church-yard, but not against the Person himself (h). For the Parson shall have an Assize or an Action of Trespass of such things as are annexed unto the Church or Glebe, or for cutting down of the Trees, or doing of Trespas in the Church-yard or Glebe, the Right and interest thereof being in the Parson (i.) But if the Bells in the Steeple, the Ornaments of the Church, or the like, be taken away, in that case the Action doth not belong

to the Parson, but to the Churchwardens (k). Notwithstanding (k) 11 H. 4.
the Parsons Right and interest as aforesaid, yet he cannot cut down 12. acc.
the Trees growing in the Church-yard of his Parish, save for the (l) Mich. 13.
Repair of the Church (l). Or if a meer Stranger cut them down, Jac. B. R. in
no Suit can be thereon in the Spiritual Court for Damages; for if Bellaine's
Suit be there commenced in the Case for Damages, no Consulta- Roll Rep. 255.
tion shall be (m). Nor can the Parson have Action for Seats in the By the Stat. of
Church taken away by a Stranger, because they are not fixed to 35 El. 1. Par-
the Freehold; But the Churchwarden may have an Action in that sons are prohi-
case (n). bited from fel-
ling down Trees

(4) No man can be a Parson until he be a Priest in Orders, which in the Church-
he cannot be until he hath attained the Age of 24 years; Conse- yard, save to
quently therefore he must be of that Age ere he can be a Parson (o); repair the
and is commonly called (when Inducted into a Church) the Rector Channel, or
thereof, and shall be accounted Proprietor of the Tithe of the Pa- Body of the
rish whereto the Church belongs, if the contrary be not shewed (m) Ibid.
(p). A man that is guilty of some Crime that is *malum in se*, as (n) 8 H. 7. 12.
Murther, Perjury, Forgery, or the like, though not convict thereof, (o) St. 13 El.
yet if the Truth thereof be certainly known to the Ordinary, may C. 12.
be rejected by him from being Parson of a Church, if thereunto (p) Style's
presented by the Patron (q); Otherwise it is, in case he be guilty Register 327.
only of a *malum prohibitum*, and not *malum in se*, as to play at un- (q) Lindw.
lawful Games, to frequent Taverns and Alehouses, or the like (r). cap. Imprimis
Also the Son is by the Canons rendred incapable of succeeding his & infra.
Father in his Parsonage (s); And if a man presented to a Living be (r) Co. 5. 58. a.
not in Orders, the Bishop may refuse him, but not for want of a (s) Lindw. c.
Testimonial (t); for if any person shall be Admitted, Instituted, and Cum à jure
Inducted into any Living before he is in Holy Orders, his Admissi- inhibendum, &c.
on, Institution, and Induction are void by the late Act of Uniform- (t) Leon. 130.
ity (u); whereby his Subscription, and thereof the Bishops Certi- (u) St. 14 Car.
ficate, also his Reading the 39 Articles of Religion in the same 2. cap. 4.
Parish-Church on some Sunday or the Lord's-day (*tempore Divino-*
rum) within two months next after his Induction, the declaration of
his unfeigned Assent and Consent thereunto, his Reading the Book
of Common-prayer, or Service appointed for the Church that day,
within two months next after his Induction, with the declaration
also of his Assent and Consent to all things therein contained, are
required, otherwise the Church becomes void, and the Parson will
be put to the proof of all the Premises, in case he Sue the Parishio-
ner refusing to pay his Tithe, if he shall insist thereon. The Sta-
ture of 13 El. cap. 12. Ordained, That the Articles agreed by the
Archbishops and Bishops of both Provinces, and all the Clergy in
the Convocation held at London, &c. shall be read by the Incum-
bent, otherwise he is *ipso facto* deprived. Or admitting all these Re-
quisites

quisites have had their due performance, so that he is a compleat Parson to all intents and purposes of Law whatsoever, yet he may not under pretence of this or that Custom, extend the Lines of his Parsonage beyond its due limits or bounds, out of an Avaricious design to advance the perquisites of his Parsonage.

(5.) *Edward Topfal* Clerk, Parson of *St. Botolphs* without *Aldersgate, London*, and the Churchwardens of the same, Libelled in the Ecclesiastical Court against Sir *John Ferrers*; and alledged, that there was a Custom within the City of *London*, and specially within that Parish, That if any person, being Man or Woman, die without that Parish, and be carried out of the Parish to be Buried elsewhere, that in such a case there ought to be paid to the Parson of this Parish, if he or she be Buried elsewhere, in the Chancel so much, and to the Churchwardens so much, being the Sums that they alledged were by Custom payable unto them, for such are were Buried in their own Chancel; And then alledgings, that the Wife of Sir *John Ferrers* died within the Parish, and was carried away and Buried in the Chancel of another Church, and so demanded of him the said Sum. Whereupon, for Sir *John Ferrers* a Prohibition * was prayed by Serjeant *Harris*, and upon debate it was granted: For this Custom is against Reason, That he that is no Parishioner, but may pass through the Parish, or lie in an Inn for that night, should (if he then die) be forced to be Buried there, or to pay as if he were; and so upon the matter to pay twice for his Burial (w).

* Note, That in Prohibition it was Resolved, that the Six months for proof of the Surmise, shall not be counted by 28 days to the Month, but according to the Kalender. In Case *Copley* against *Collins*, Hob. Rep. (w) Trin. 15. Jac. C. B. 8d. *Topfal* and others vers. *Ferrers*. Hob. Rep.

(x) Pasch. 35. Eliz. *Crocker* and *York* vers. *Dormer*. in *Poph. Rep.*

(9.) The words *Parsonage*, *Church*, and *Rectory* are frequently in the Law used Synonymously and promiscuously; but the word *Advowson* is another thing, and distinct from each of them. And as to some Parsonages there are certain Rents due and payable, so out of some Parsonages or Rectories there are issuing certain Rents or Pensions, which *Pensions* are not suable at the Common Law, but in the Ecclesiastical Court, as was said in *Crocker* and *York's* Case against *Dormer*, against whom they had a Recovery in a Writ of Entry in the *Post*, among other things of a yearly Rent or Pension of four Marks, issuing out of the Church or Rectory of *F.* In which Case it was agreed by *Clench* and *Feuner*, that a Pension issuing out of a Rectory is the same with the Rent; of which *Popham* seemed to make some doubt; for there being in that Case a Demand for Rent in the Disjunctive, viz. a Rent or Pension, he moved that the greatest difficulty in the Case was the Demand made in the Disjunctive, viz. of an Annual Rent or Pension; for if a Pension issuing out of a Rectory shall be said to be a thing meerly Spiritual, and not to be demanded by the Common Law, or meerly of another nature than the Rent it self, with which it is there conjoyn'd by the word [or,] that then it is Erroneous (x).

(7). B.

(7.) *B.* brought an Action of Debt against *W.* upon an Obligation of 600*l.* the Condition was, That if *W.* Resign a Benefice upon Request, that then the Obligation should be void. And the Condition was Entered; the Defendant Demurred, and Judgment in *B. R. pro Querente.* And upon Error brought, Judgment was Affirmed in the *Exchequer*; for this Obligation is not voidable by the Statute of 14 *Eliz.* which makes Obligations of the same force, as Leases made by Parsons of their Glebes, *viz. per Non-Residency.* And it doth not appear by the Plea of the Defendant, that it was not an Obligation *bona fide*, which might be lawful; As if a Patron which hath a Son, which is not yet fit to be presented for default of Age, and he present another with an Agreement, that when his Son come to the Age of 24 years, he shall Resign it, it is a good Obligation. And this Case, *viz.* an Obligation with Condition to Resign had been Adjudged good in the Case of one *Jones, An. 8. Jac.* And the Counsel said, That he who is presented to a Church is Married thereto, and it is like as if a man who hath married a Wife, should be bound to be divorced from her, or not cohabit with her, these Conditions are void. But these resemble not our Case (7).

(7) *Babington*
vers. *Woodhurst.*
Rep.

(8.) It was said in *Johnson's Case*, That if a Parson Leases his Rectory for years, or parcel of his Glebe, reserving a Rent, and dies, if his Successor accepts the Rent, that Acceptance does not make the Lease good; because by his death the Franktenement is in Abeyance, and in no Man. And also a Parson cannot Discontinue: And by consequence, That that he did without Livery, is determined by his death. And it is not like to the Case of an Abbot, Prior, or Tenant in Tail (8).

(9.) *Hendon* moved for Dr. *Clay*, Vicar of *Hallifax*, That a Prohibition might be granted to the High Commissioners of *York*, for that, that these Articles by one *Smith* were exhibited against him, *viz.* 1. That he read the Holy Bible in an irreverent and undecent manner, to the scandal of the whole Congregation. 2. That he did not do his duty in Preaching; but against his Oath and the Ecclesiastical Canon, had neglected for sundry Mornings to Preach. 3. That he took the Cups and other Vessels of the Church, consecrated to holy use, and employed them in his own House, and put Barm in the Cups, that they were so polluted, that the Communicants of the Parish were loth to drink out of them. 4. That he did not observe the last Fast (Proclaimed upon the Wednesday) but on the Thursday, because it was an Holy-day. 5. That he retained one *Stevenson* in one of the Chappels of Ease, who was a Man of ill Life and Conversation, *viz.* an Adulterer and a Drunkard. 6. That he did not Catechize according to the Parish Canon: but only bought many of Dr. *Wilkinson's* Catechisms; for every of which

(2) *Johnson's*
Case. *Hetley's*
Rep.

he paid 2 *d.* and sold them to the Parishioners for 3 *d.* without any examination or instruction for their benefit. And that he, when any Commissions were directed to him, to compel any person in his Parish to do Penance, exacted Mōny of them, and so they were dismissed, without inflicting any penalty upon them, as their Censure was. And that he and his Servants used divers Menaces to his Parishioners, and that he abused himself, and discharged his Function by divers base Labours, viz. *He made Mortar, having a Leather Apron before him, and he himself took a Tithe-Pigg out of the Pigsty, and afterwards he himself gelded it.* And when he had divers Presents sent him, as by some *Flesh*, by some *Fish*, and by others *Ale*, he did not spend it in the invitation of his Friends and Neighbours, or give it to the Poor; but sold the *Flesh* to Butchers, and the *Ale* to Ale-wives. And that he commanded his Curate to Marry a Couple in a private House, without any License: And that he suffered divers to Preach, which peradventure had not any License, and which were suspected persons, and of evil Life. It was said by *Henden*, That they cannot by the Statute of 1 *Eliz. cap. 1.* meddle with such matters of such a nature, but only examine Heresies, and not things of that nature; and that the High Commissioners at *Lambeth* certified to them, that they could not proceed in such things, and advised them to dismiss it; but they would not desist. And the Judges (*Richardson* being absent) granted a Prohibition, if cause were not shewn to the contrary (a).

(a) *Smith* 2.
against *Dr. Clay.*
Hertley's Rep.

(10.) A Parson makes a Lease for 21 years, the Patron and Ordinary confirm his Estate for 7 years; the Parson dies: The Question is, Whether that Confirmation made the Lease good for 21 years, or but 7 years. And it seemed to *Hutton*, That the Lease was confirmed but for 7 years. But *Richardson* was of the contrary Opinion, and took a difference, where they Confirm the Estate, and where they Confirm the Land for 7 years, The Confirmation confirms all his Estate: But where they confirm the Lease for 7 years, That Confirmation shall not enure but according to the Confirmation. And that difference was agreed by *Crook*, and all the Serjeants at the Barr. And afterwards *Hutton* said, That that was a good Cause to be considered, and to be moved again (b).

(b) *Tomlinson's*
Case.
Hertl. Rep.

(c) *Cold* against
Waters. Noy's
Rep.

(11.) In a *Replevin*. And the Title was by Lease made by a Parson; And the Avowry was, That *A.* was seized of the Rectory of *H.* and made a Lease, without shewing that he was Parson. And by the Court, That that should have been a good Exception, if it had not been said in the Avowry moreover, That *A.* was seized in *jura Ecclesie*, which supplies all (c).

(12.) During the time of the Parson, the Patron hath nothing to do in the Church (d). And therefore if the Patron grant a Rent (d) 11 H.64.b. by Fine out of the Church being then full, and afterwards the Incumbent dies, that charge shall not bind the Successor, for that the Parson and the Ordinary were no parties to it (e). (e) 38 E. 34.

(13.) If a Parson would Resign, the word [Resignare] is not it seems the only proper word in the Law for Resignation, but [Renunciare, Cedere, & Emittere] are the usual words or terms of Resignation (f). Yet if a Prebend doth give, grant, yeild, and confirm his Prebendary and the Possessions thereunto belonging unto the Ordinary, To have and to hold to him and his Successors in Fee, subjecting and submitting to him *Omnia jura* by reason thereof *quatercunque acquisita*; these words it seems are sufficient and amount to a Resignation, albeit the proper words are not therein (g). Which Resignation ought to be made to the Immediate Ordinary, and not to the Mediate; for which reason a Prebend may not Relinquish to the King, for that although he is Supream Ordinary, yet he is not the Immediate Ordinary, and he is not bound to give Notice to the Patron, as the Ordinary ought, nor of himself can Collate, but is to present to the Ordinary (b). (f) D. 13 El. 294. b. The Cognizance of Resignation properly belongs to the Ecclesiastical Court. Mich 10. Jac. B. Manknoll's Case per Cur. Roll. Abr. fo. 294. (g) Ibid. (b) Ibid. & Roll. Abr. yer. Presentment. li. E. pag. 358. Hill. 2. Jac.B.R. Fairchild and Gayer's Case Cro. par. 2.

(14.) In Trespass: The Case was, The Defendant being Incumbent of the Church of B. (M. and G. having the Donation thereof) made an Instrument, whereby *Concessit & Resignavit* to M. & omnibus ad quos in hac parte pertinet ad acceptandam Ecclesiam suam de B. and thereupon the two parties gave it to the Plaintiff, who being disturbed by the Defendant brought Trespass. The Question was, Whether a Resignation of a Donative could be to the Donor, or how it might be departed with. Resolved (1.) That this being a Donative, begun only by the Foundation and Erection of the Donor; he hath the sole Visitation, and the Ordinary hath nothing to do therewith; and as the Parson comes in by the Donor, so he may restore it to him; and although the Presentee, when he is in, hath the Freehold, yet he may revelt it by his Resignation without any other Ceremony, and the Ordinary hath nothing to do with it: For Admission and Institution are not necessary in case of a Donative. (2.) Resolved, That the Resignation to one of the parties is good, for it doth enure to both as a Surrender shall do. (3.) Resolved, That although the Resignation was *de Ecclesia*, yet it shall extend to all the Possessions.

(15.) Ar.

(15). At a Synod in 44 *Ed. 3.* a Canon was made; That the Parson of every Church of *England* shall appoint the Parish-Clerk. And at another Synod held in *An. 1603.* a Canon was made to the same effect; and yet it doth not take away the Custom where the Parishioners or Church-wardens have used to appoint the Clerk, because that is Temporal, which cannot be altered by a Canon.

(i) M. 24 Jac.
B. R. *Walpole*
& *Gale*, per
Cur. & Roll.
Abrid. ver.
Prerogative,
lit. Y.

(i). If the Clerk of a Parish in *London* hath used time out of mind to be chosen by the *Vestry*, and afterwards Admitted and Sworn before the Archdeacon, and he refuse to Swear such Clerk so Elect, but Admits another chosen by the Parson: In this Case a Writ may be awarded, commanding him to Swear the Clerk chosen by the *Vestry*. 22 Jac. V *Walpole's Case*. The like Writ was granted for the Clerk of the Parish of *St. Fosters, London*. *Mitch. 16. Car. B. R.*

(k) Roll. ibi
lit. L.

between *Orme* and *Pemberton* (k). The Parishioners of the Parish of *Alphage* in *Canterbury* prescribed to have the Nomination and Election of their Parish Clerk, and the Parson of a Parish by force of a Canon, upon voidance of the place of the Parish-Clerk, elected one to the Office: The Parishioners by force of their Custom elected C. the Parson, supposing this Election to be Irregular, for that it was against the Canon, Sued C. before Dr. *Neman* Chancellor of *Canterbury*, and the said C. was by Sentence deprived of the Clerkship of the Parish, and another Clerk of the Parish Admitted. C. moved for a Prohibition, and had it granted by all the Court; for it was held, That a Parish-Clerk is a meer Lay-man, and ought to be deprived by them that put him in, and no others; and the Canon which willet that the Parson shall have Election of the Parish-Clerk, is meerly void to take away the Custom, that any person had to Elect him. *Vid. Stat. 25 H. 8.* That a Canon against Common Law, confounding the Royal Prerogative of the King, or Law of God, is void; and Custome of the Realm cannot be taken away but by Act of Parliament. *Vid. 21 Ed. 4. 44.* And it was Resolved, That if the Parish-Clerk misdeemean himself in his Office, or in the Church; he may be Sentenced for that in the Ecclesiastical Court to Excommunication, but not to Deprivation: And afterwards a Prohibition was granted by all the Court; and held also, That a Prohibition lieth as well after Sentence in this Case as before. And in *Germin's Case*, Whereas the Church-wardens and Parishioners of R. furnizd they had a Custom to place a Clerk there by the Election of the *Vestry*; the Parson sued them in the Ecclesiastical Court, to have his Clerk placed there, according to a late Canon made: It was the Opinion of the Court, that it was a good Custom, and that the Canon could not take it away; wherefore a Prohibition was granted.

Patch, 4 Jac.
C. B. *Gaudy*
vers. Dr.
Newman,
Brownl. Rep.
par. 2.

Trin. 21 Jac.
B. R. *Jermin's*
Case.
Cro. par. 2.

(16). A

(16.) A Bishop, Archdeacon, Parson, are Spiritual Corporations at the Common Law; for the Parson (and this is meant also of the others) hath two Capacities (*l*), the one to take him and his Heirs; the other to him and his Successors, and in that respect he is seized *jure Ecclesie*. If *J. S.* be Parson of *D.* and Land be granted to *J. S.* Parson and his Successors, and to *J. S.* Clerk and his Heirs, in this case he is Tenant in Common with himself (*m*). *l*) 40 E. 17.
Br. Dean, &c.
2. 14 H. 8. 30.
b.
(*m*) 14 H. 8.
ibid.

(17.) Note, That it was agreed in *Bushie's Case*, That if a Parsonage be inappropriate, and the Vicarage be endowed, and difference be between the Parson and the Vicar concerning the Endowment, that shall be tried by the Ordinary, for the Persons and the Cause are both Spiritual: And there the Vicar sues the Parson for Tithes, and suggests the manner of Tithing, and prays a Prohibition, and it was granted, and after upon solemn Argument Consultation was granted, inasmuch that the manner of Tithing did not come in question, but the Endowment of the Vicarage only; for that is the elder Brother, as the Lord *Coke* said: This was cited to be Adjudged by *Coke*. Also there is much difference between Prebends and Parsons; for it was Adjudged in *Watkinson and Man's Case*, That a Lease made by a Prebend is good by the Statute of 32 H. 8. for he is not excepted, but only Parsons and Vicars; and so it was said it had been Adjudged in *Doctor Dale's Case*. *Bushie's Case*.
Brownl. par. 2.

Watkinson and Man's Case.
Cro. par. 1.

(18.) It wil not be denied, but that the Clergy of *England* have had in all Ages certain Priviledges, which the Laity never pretended to: To which purpose there have been Laws Enacted and Cases Ruled by persons learned in the Laws. In *An. 22 H. 8. cap. 5.* it is Enacted; That the decayed Bridges in every County, where it cannot be known who in right ought to repair the same, shall be repaired by the Inhabitants of the said County, Town corporate, or riding where the Bridge is, by the Assessment of the Justices of Peace, who may appoint Collectors to levy the same by Distress. Now the Question is, Whether the Parsons and the Vicars may be charged by the general word of the *Inhabitants*, and Distress taken of their Spiritual Livings? In order to a Resolution of this Question, it must be premised, That it is most evident, that the Clergy are by the common Law of this Kingdom a divided Estate both for their Persons and Spiritual promotions, from the Laity of this Land (1). For their Persons, *Fitz. NB. fo. 175.* That Clerks shall not be chosen Bayliffs or Beadles for the Lands in their possessions, although the Land, before it came to the hands of the Clerk, was charged therewith by tenure. (2). A Clerk arraigned

raigned before a Temporal Judge for Felony, may plead the Jurisdiction of the Court; The Clergy-men, by reason of their Resistance, are not bound to the Lect, nor to follow *Hugh and Cry*. (3.) That their Spiritual Livings are also discharged from the general charge of this Realm's Laity, appears by the *Register*, fo. 260 & *F.N.B.* fo. 227. That Spiritual persons shall not be charged to pay Toll, Pontage, or Murage, but may discharge themselves by Writ. Also the Sheriff, who by the Law is the King's general Officer to serve Process in every County, may not intermeddle with the Clergy, in respect of their Spiritual promotions, but return *Quod Clericus est. Beneficiatus in Episcopatu, non habens Laicum fœdum in balivâ mea*; and then the Process must be to the Bishop, as appears 34 H.6. & 21 H.6. This Priviledge is confirmed to them by *Magna Charta*, and divers Grants and Statutes, viz. *Articulus Cleri*, 9 E. 2. cap. 9. Likewise no Distress shall be taken in the Ancient Donations of the Church. The like Grant is made unto them by King Ed. 1. 24. *Protestation* 2. That the Sheriff or Minister of the King shall not meddle with the Goods, Chattels, or Carriages of the Clergy; and in *Purveyors*, 12 An. 14. Ed. there is a Statute, that *Purveyors* shall not meddle with the Clergy, &c. Ed. 1. cap. 1. 1 R. 2. cap. 2. 1 H. 4. cap. 3. Statute *Spiritualities*. 2. Priviledges, Grants, Immunities of the Clergy are confirmed. So that it appears both by the Common Law and the Statutes, that the Clergy are not to be burthened in the general charges with the Laity of this Realm, neither to be troubled or incumbered, unless they be especially named and expressly charged by some Statutes. And divers Statutes heretofore expressing themselves with the like general words, have never been expounded to extend to the Clergy, as by the usage of them appears by the Statute of *Winton*. An. 13 Eliz. 1. Again, the people dwelling in a Hundred where any Robbery is committed, shall either bring forth the Felon, or agree with him that is robbed, yet hath it never been taken, that *Parsons* and *Vicars* should be Contributors thereunto; yet the words [*Gentes demorantes*] viz. *the People dwelling*, are as general words as [*Inhabitants*]. In the same Statute there are the like general words [*Watching, &c.*] yet the Clergy thereby are never charged. Also the Statute made for the High-ways, An. 2 & 3. P. & M. chargeth every Houholder; yet this general [*Houholder*] hath never been taken by usage to charge the Clergy, viz. the *Parson* or *Vicar*. Fitz. in his *Nat. Bre.* fol. 131. saith, that a Clerk being bound in a Statute-Merchant, shall not be taken by his Body: And the Writ founded upon the Statute-Staple, 27 Ed. 3. cap. 9. hath this special *Proviso*, *Si Laicus sit, capias*. Also the Statute whereupon this Writ is found-

founded, is general, and no exception made at the Clergy. And 33 H. 8. cap. 2. there is a Statute that chargeth all Refiants within any County where there is no Goal, to be Taxed by the Justices for the Building of one, yet have the Clergy never been charged by reason of these general words [*Refiants, &c.*] 1 Ed. 1. 18 Ed. 3. 4. 1 R. 2. 1. For these reasons it is supposed, that the general words in the aforesaid Question will receive in Law the like Exposition, as the other said recited Statutes have done; And the *Parsons* and *Vicars* shall not thereby be charged, the rather for that the Statute sets down the Inhabitants of the County, where certain persons that should do it, cannot be known, which is to be intended such Inhabitants as are chargeable to *Pontage*, which Spiritual persons are not, but excepted, as aforesaid.

C H A P. XVIII.

Of Vicars, Vicarages, and Benefices.

1. *The Vicar and Vicarage described according to Law.*
2. *What difference between Vicarage and Parsonage; their several Rights and Interests respectively.*
3. *Whether a Vicarage Endowed may be Appropriated, and how?*
4. *The Chaplain of the Vicar of Hallifax his Case for his Salary.*
5. *Vicars may Sue in the Ecclesiastical Courts for Pensions.*
6. *How a Vicarage may be created.*
7. *The Resolution of Court touching the Vicar's Tithes, in reference to the Parsons Glebe.*
8. *Cases in Law touching the Parsons and the Vicar's Tithes, where Composition or Prescription is in the Case.*
9. *Who is Patron of the Vicarage, whether the Parson or the Patron?*
10. *In what Case the Vicar may Sue in the Ecclesiastical Court for an addition or increase of Maintenance.*
11. *In what case a Vicarage shall determine; and what shall be an union of Parsonage and Vicarage.*
12. *Benefice how defined by the Canon Law, with the Reasons of that Definition.*
13. *Benefices Ecclesiastical extend to Ecclesiastical Dignities by the Canon Law, but not so within the Statute of 21 H. 8.*
14. *Of what an Ecclesiastical Benefice consists according to the Canonists.*
15. *Cautionary Laws relating to Benefices; by what marks or signs an Ecclesiastical Benefice is known at the Canon Law.*
16. *The common distinction of Ecclesiastical Benefices at the Common Law.*
17. *A Case in Law touching a Vicarage, whether Dissolved, or not?*
18. *Vicarages of Two sorts, how compared to a Commendam.*

(1.) **V**ICAR is he who hath that Spiritual Living called a *Vicarage*, being no other than a certain part or portion of a Parsonage, allowed to the Minister for his Maintenance, introduced :
at

at that time when Improprations first began; both which Livings as they are Commonly Called the Church, so both such as serve in them, are called the Patron's Clerks. The *Vicar* is usually appointed and allowed to serve the Cure, by him who hath the Impropration of the Parochial Tithes; for at the Original of such Improprations a certain portion of the Parsonage was allotted and set apart from the rest to maintain the Vicar, who was to serve the Cure (a); So that now the Priest of a Parochial Church, where the Predial Tithes are improprated, is called the Vicar, *b. e. vice Rectoris*. And it seems Anciently they did sometimes style themselves *Perpetual Vicars*, because every Vicarage, Corporation-like, hath a constant Succession.

(2.) A Parsonage and a Vicarage (as appears in *Britton and Wade's Case*) are two distinct Benefices, and both have *curam animarum*, the Parson *habitualliter*, the Vicar *actualiter*; and although the Vicarage be Spiritual, yet the Corporation is Temporal, which the Pope could not dissolve (b): And in the Case between *Parry and Banks*, it was Resolved, That after the Statute of 31 H. 8. which made Parsonages Lay-Fees, the Ordinary could not dissolve a Vicarage, when the Parsonage is in a Temporal hand; for that were to destroy the Cure (c). Vicarages being originally endowed out of Parsonages, the Vicar was to have aid of the Parson, if he were impleaded for any thing touching the Vicarage, and the Parson was subject to every charge of the Vicarage (d). And anciently the Vicar was not held as Tenant of the Freehold of the Glebe of the Vicarage (e), but the Freehold thereof was in the Parson, and the Vicar could not maintain an Assize in his own Name (f). But now it seems the Freehold of the Glebe of the Vicarage is in the Vicar himself, and not in the Parson, for that the Possessions of the Vicar and Parson are severed, and each of them shall have several Writs concerning their respective Rights, and shall not joyn in one Writ (g): and the Vicar shall have and maintain a Writ of *Juris Utrum* against the Parson, who is the Patron of the Glebe of the Vicarage, for the same Glebe (h). This Vicarage being a certain portion of a Parsonage allowed to the Vicar for his maintenance as aforesaid, is in some places a sum of Money certain, in others a part of the Tithes in kind, commonly the smaller Tithes, and in some places a part of the great Tithes also: And Vicarage Lands occupied by the Vicar, do in some places pay no Tithe to the Parson (i).

(3.) In *Ward's Case* it was said by *Montague*, That a Vicarage endowed might be Appropriated, but not to the Parson, to which *Haughton and Doderidge* agreed, 31 H. 6. *Fitz. tit. indicavit*, is, that such a Vicarage may be dissolved: an Appropriation may be by the

The Parson Patron and Ordinary may create a Vicarage. 3 R. 2. annuity 53. Omnis Vicaria est Ecclesiastica per Coke, in the Kings Case against Zakar. Bulstr. par. 3. (a) Plow. 495.

(b) Mich. 16. Jac. B.R. *Britton and Wade's Case*. Cro. 2. par. 516, 517, 518.

(c) 12 Jac. in the Excheq. *Parry and Bank's Case*. Hugh. Abr. verb. *Appropriations*.

(d) 31 H. 6. 13. by *Yelverton*. (e) 8. Aff. 36. 15 Aff. 8. acc.

(f) 12 E. 3. Fitzh. tit. Brief. 256.

(g) Parson's Law. cap. 23. (h) *Ibid*.

(i) Cro. Ju. 60 Cro 2. 44. Bro. Diffring.

King sole where he is Patron, but there is no Book that it might be by the Patron sole. *Grindon's Case* in *Plowden*, and 17 E. 3. 39. an Appropriation cannot be without the Kings License. In that case it was agreed, That Tithe Lamb and Wool was included within small Tithes (k), which Tithe belongs to the Vicar.

(k) Trin. 16.
Jac. B. R.
Nicholas —
and *W. Ward's*
Case.
Poph. Rep.

(4.) A Chaplain that was under the Vicar of *Hallifax*, Libells against him in the Ecclesiastical Court for his Salary. And he prescribes, That the Vicar ought to pay the Chaplain four Pounds a year; and the Vicar prays a Prohibition. (1) For that he alledges, That the Chaplains were *Eligible* by himself; and because that Chaplain was not *Elected* by him, he is not Chaplain; but he is in of his own wrong, &c. (2) That Prescription for Salary was Triable at the Common Law. *Yelverton*, The Salary is Spiritual as the Cure it self is Spiritual, for which it is to be paid. As the Case in *Dyer*, 58. Pl. 4. But a Prohibition was granted, untill it was determined to whom the Election appertained; and that now depends by Prohibition in this Court (l).

(l) Trin. 3.
Car. C. B.
The Vicar of
Hallifax, his
Case.
Hetley's Rep.
Pension.

(5.) G. Vicar Sues in the Ecclesiastical Court the Dean and Chapter of *Wells*, Parson of a Church, for a Pension, and they pray a Prohibition, and it was denied; For that Pension is a Spiritual thing, for which the Vicar may sue in the Spiritual Court (m).

(m) *Goodwin*
vers. Dean and
Chapter of
Wells.
Noy's Rep.

(6.) The Parson, Patron, and Ordinary may Create a Vicarage and Endow it without the Assent of the King; but the Ordinary cannot Create a Vicarage without the Patrons Assent. 6 E. 3. *Quare Impedit*, 145. And in or during the Vacancy, the Patron of a Parsonage and the Ordinary may Create a Vicarage. 8 R. 2. *Annuiti* 53, per *Belk*. And before the Statutes of Dissolutions, a Parson Impropriate and the Ordinary might Create a Vicarage, for the Parson was Parson and Patron. *Ibid* (n).

(n) *Roll's*
Abridg. verb.
Vicarage.

(7.) It was Resolved *per Curiam*, That if a Vicar be endowed out of a Parsonage of all the white Tithes growing and renewing within the Parish upon all the Land of the Parish; the Vicar shall not therefore have the Tithe of the Parson's Glebe, for that is excepted; nor the Tithes of the Land, which at the time of the Endowment of the Vicarage was parcel of the Glebe, but since severed from the Glebe, for that at the time of the Endowment that Land was exempted out of the Endowment (o).

(o) Trin. 38.
Eliz. B. R.
Blenco &c
Marston.
Rol. ib. verb.
Vicare endow-
ment, nu. 3.

(8.) If there be a Composition made between the Parson and the Vicar, That the Parson shall have all the Tithe of *Corn* and *Hay*, and the Vicar the other Tithes, and afterwards the Parson sows certain Lands with *Saffron*, or the like, the Parson shall not have the Tithe of the *Saffron*, but the Vicar. By *Coke* so Adjudged (p). It hath also been Resolved, if a Vicar be endowed of the Small Tithes by Prescription, and afterwards the Land which had

(p) Trin. 7.
Jac. B. R.
Roll. ib. nu. 4.

had been Arable time out of mind, is converted from Arable, and there grow small Tithes, the Vicar shall have them, for his Endowment doth not go to the Land, but *Minutis Decimis* in every place within the Parish (g). And if a Vicar be endowed of the third part of all the Tithes of a Manor, he shall have Tithes as well of the Freehold as Copyhold, for all makes the Manor (7).

(9.) The Parson and not the Patron of the Parsonage, of Common right is Patron of the Vicarage, for that it is derived out of the Parsonage. *Dubitat* 17 E. 3. 51. b. *Contra*, 5 E. 2. *Quare impedit*, 165. per *Pass.* And if a Parson Appropriate create a Vicarage, he shall be Patron thereof, 17 E. 3. 51. he is both Parson and Patron

(10.) So likewise if there be a Vicar and a Parson Appropriate, the Ordinary and the Parson Appropriate may in time of vacation of the Vicarage re-unite the Vicarage to the Parsonage (r).

(10.) If there be a Parsonage Appropriate in an Ecclesiastical person, which never came to the King by the Statute of *Monasteries*, and a Vicarage endowed be there also; and the Parson make a Lease of the Parsonage for Lives, according to the Statute of 32 H. 8. The Vicar may in that case sue in the Ecclesiastical Court against the Parson and his Lessee, who comes in by the Statute for Addition of Maintenance, and the Ordinary may well compel them to increase his Maintenance, for over all Appropriations such power of increasing the Vicar's Maintenance was reserved to the Ordinary, and the Lessee comes in subject to that charge (u).

(11.) If the Vicarage be diminished, he shall have more of the Parsonage, if what remains be not sufficient: And if the Parsonage be impoverished and so decayed, that the Parsonage by it self, nor the Vicarage, have sufficient to sustain them, in that case the Vicarage shall determine and be restored to the Parsonage: And to this the Doctors also do accord (w). It hath been also held, if a Parson Appropriate, who is Patron of the Vicarage of the same Church by Agreement between him and the Ordinary, who presents the Vicar to that Parsonage, it is an union of the Parsonage and Vicarage; but if a Lessee of a Parsonage present the Vicar to the Parsonage, that shall not bind the Lessor (x). And if there be a Vicarage and Parsonage (and both void) and one present his Clerk as Parson, and he is so inducted that shall unite the Parsonage and Vicarage again (y). And in case that there be a Vicar Endowed who is *Presentative*, and also a Parson *Presentative*, it seems that the Parson hath not the Cure of Souls, but the Vicar (z).

(g) Pasch. 38. Eliz. B. R. inter *Bedingfield and Freak.*
(7) R. 38. Eliz. B. R. *Higham and Bess.*
Adjudged.

(r) Roll. Abr. verb. *Vicarage.*
(r) Mich. 7. Jac. B. R. *Stafford's Case.*

(u) Hill. 9. Car. B. R. inter *Hitchcock and Thornborough.*

(w) 31 H. 6. 14. Roll. Abr.

(x) 44 E. 3. 33. b. 44. A. 11. 33.
(y) 11 H. 6. 4. 3.
(z) 5 E. 2. *Quare impedit.*
165. per *Pass.*

(12.) Benefice [*Beneficium*] according to a general acceptation may comprehend all Ecclesiastical Livings, be they Dignities or other, as in the Statute of 13 R. 2. where they are divided into *Elective* and *Donative* (a): But according to a more strict and proper acceptation, *Dureus* seems to give it an apt definition, where he says, it is *Res Ecclesiastica, quæ Sacerdoti vel Clerico, ob Sacrum Ministerium utenda, in perpetuum concedatur* (b). [*Res*] because it is not the Ministry it self or the Office, but rather the profit thence arising, that is, the *Benefice*. [*Ecclesiastica*] because such profit is dedicated to God and his Church. [*Sacerdoti, &c.*] because where a thing Ecclesiastical is granted to Lay-men, it is not properly said to be a Benefice in this sense. [*Ob Sacrum Ministerium*] because as Dedicated to God, they are for the use of such as wait on his Altar. [*Utenda*] because they have rather the Usufruct thereof, than any Fee or Inheritance therein. [*In perpetuum*] because they are annexed to the Church for ever. Benefices with Cure of Souls seem most properly to be the *Parsonages* and *Vicarages* of Parochial Churches. Sir H. Hobart Chief Justice, in *Colt and Glover's Case* against the Bishop of *Coventry and Litchfield*, says, (speaking of the Statute of 21 H. 8. cap. 25.) That Bishopricks are not within the Law under the word [*Benefices*]: So that if a Parson take a Bishoprick, it avoids not the Benefice by force of that Law of *Pluralities*, but by the Ancient Common Law, as it is holden, 11 H. 4. 60.

(13.) This word *Beneficium Ecclesiasticum* extendeth not only to Churches Parochial and the Benefices thereof, but also to Dignities and other Ecclesiastical promotions; as to *Deanries*, *Archdeaconries*, *Prebends*, &c. (c). *Lindw. de vir. & bon. Cle. c. Exterior.* Sir Edw. Coke affirms, that it appears in the Books of their Law (d) That *Deanries*, *Archdeaconries*, *Prebends*, &c. are Benefices with Cure of Souls; but they are not comprehended under the Name of *Benefices with Cure of Souls* within the Statute of 21 H. 8. by reason of a special *Proviso*; which they had been, if no such *Proviso* had been added †, viz. *Deans*, *Archdeacons*, *Chancellors*, *Treasurers*, *Chauinters*, *Prebends*, or a *Parson* where there is a *Vicar* endowed (e).

(a) Coke's Inst.

par. 3. cap. 71.

(d) 9 E. 3. 22.

29 E. 3. 44.

10 E. 3. 1.

Regist. 58.

21 H. 8. c. 13.

verf. finem.

† Such in any

Collegiate or

Cathedral

Church, or any

Parsonage with a

Vicar endowed, or any

Benefice perpetually

Improprate, are not

Benefices with Cure of

Souls within the Stat.

of 21 H. 8. against

Pluralities. (e) Co. ubi supra.

14.) The Canonists do hold, That an Ecclesiastical Benefice consists of the Sacred Function, and of the Provenues thereunto belonging (f); It is a distinct portion of Ecclesiastical Rights joyned to the Spiritual Function, and until it be set apart, separate, and distinguished from temporal Interests, it is not properly an Ecclesiastical

(f) Can. si quis

objecerit, 1. q. 3.

affical Benefice; it is termed a portion, in that it includes Fruits, for a Benefice without Fruits cannot properly be so called.)

(15). By the *Jus Commune* no man can at once and at the same time possess two Benefices with Cure of Souls, as incompatible. *Tot. decis. Rot. 445. tit. de Præb. in novis. Non datur Beneficium nisi propter Officium*, he that performs not the one, ought to be deprived of the other. *C. fin. de Rescript. in 6. Can. Eos. Cano. si quis Sacerdotum 81. distinct.* All pecuniary Contracts, all mercenary Trading and Merchandizing for Benefices is to be abhorred; Ecclesiastical Benefices are of such a Spiritual Constitution, that they are not capable of being bought or sold; they fall not within the walk of human Commerce, but ought to be conferr'd *gratis*. And for Non-residence the Parson ought by the very Letter of the Law to be deprived of his Benefice and the Fruits thereof. *c. Uni de Cleric. non-residen. in 6. Panormitan* observes Six signs whereby an Ecclesiastical Benefice may be known: As (1) That according to the *Jus Commune* it ought to be bestowed by one who hath a right and power in him so to do, meaning the true Patron (2) That he who doth give or bestow it, do reserve nothing thereof or therein for himself, directly or indirectly (3) That it be given purely as a provision and maintenance for the Clerk (4) That it hath ever something of Spirituality annex'd to it (5) That in its nature it be perpetual. (6) That all manner of Contracts and Bargains concerning it be utterly rejected. *Panorm. Consil. 47. Anchor. de Regul. prim. de reg. jur. in 6. q. 6. Decius in Rub. de Rescript.*

(16) Whatever is enjoyed as a Benefice, is had and obtained either by way of Title, or Canonical Institution; *Lind. de cobabit. Cle. & Mulier. c. ut Clericalis. verb. Beneficiari.* Ecclesiastical Benefices being commonly distinguish'd into *Presentatives* and *Donatives*; for a Parochial Church may be Donative, and exempt from all Ordinaries Jurisdiction. For if the King doth found a Church or Chappel, he may exempt the same from the Ordinaries Jurisdiction; in which case the Lord Chancellor and Lord Keeper shall Visit the same. *20 E. 3. Excommeng. 9. 21 E. 3. 60. Parsons Law, cap. 28.* Or if the King by his Letters Patents doth License a Common person to Found a Church or Chappel, exempt from the Ordinaries Jurisdiction, the same shall be Visited by the Founder, and not by the Ordinary. *6 H. 7. 4. per Kible, 8 Ass. 29. F. N. B. 42. acc.* And if such Clerk Donative be disturbed in his Incumbency, the Patron or Founder shall have a *Quare impedit Presentare*, and declare upon the Special matter. But if a Patron of a Church Donative doth once present unto the Ordinary, and his Clerk be admitted and Instituted, it is now become Presentable, and it shall never be donative after, and then the Ordinary shall Visit the same, a *Proxies* shall be paid

(g) Co. 1. par.
Inst. 344. &c
2 H. 6. 26.

(b) F. N. B.
35. E.
(i) Coke, 1. 3.
fol. 75. b.
(k) F. N. B.
fo. 33. c. &c
42. b.

(i) Cowel
Interpr. verb.
Donative.

Mich. 16 Jac.
B. R. Britton,
and Wade's
Case.
Cro. par. 2.

paid, and Lapse shall incur to the Ordinary, as in all other Benefices presentable (g); but so long as it remains Donative, it is without the Jurisdiction of the Ordinary. For a *Donative* is a Benefice merely given and collated by the Patron to a man without either Presentation to, or Institution by the Ordinary, or Induction by his Order (b). All Bishopricks were antiently *Donative* by the King (i): and it is said, that there are certain *Chauntries*, which may be given by Letters Patents (k). The Original *Donatives* in England are supposed to be from what Mr. Guinn mentions in the Preface of his Readings, viz. That as the King might antiently Found a Free Chappel, and exempt it from the Diocesan's Jurisdiction: So he might also by his Letters Patents License a Common Parson to Found such a Chappel, and to Ordain that it shall be *Donative* and not Presentable, and that the Chaplain shall be deprivable by the Founder and his Heirs, and not by the Bishop (l). Whether such *Donatives* are properly *Benefices Ecclesiastical* may well admit of an Enquiry; for where *Petr. Gregorius* speaks of Chappels Founded by Lay-men, not approved by the Diocesan, nor by him as it were Spiritualiz'd, he there says plainly, that they are not accounted *Benefices*, nor can they be conferred by the Bishop; but the Founders and their Heirs may give such Chappels, if they so please, without the Bishop: *Petr. Gregor. de Benefic. cap. 11. nu. 10. & Guid. Pap. Decis. 187.* And *Lindwood* makes a very prolix question on the same reason, whether *St. Martins Le Grand Lond.* be *Ecclesiasticum Beneficium*, or not, Arguing it *Pro* and *Con*, but concludes in the Affirmative. *Lindw. de Cobah. Cler. & Mul. cap. ut Clericali.*

(27.) The Prior of D. was seized of the Advowson of the Church of N. appropriated to his Priory, and also of the Vicarage of N. endowed with small Tithes: The Appropriation and Endowment were both in the Time of King *John*, and continued till the time of *Hen. 6.* when the Pope granted by his Bulls, That the Prior should appoint one of his Monks to officiate the Cure, who should be removed *ad nutum Prioris*: The point was, whether the Vicarage was dissolved? *Resolved* (1) That a Vicarage Perpetual could not be dissolved after the Statute of 4 H. 4. and that the Pope could not make any Ordinance against that Statute, nor Displace by his Bulls with the Law, though they tend in *Ordine ad Spiritualia* (2) There were no words that amount to a Dissolution, but the words only are, That the Vicar should be *ad nutum Prioris*. (3) The Parsonage and Vicarage are two distinct Benefices, and both have *Curam animarum*, the Parson *habitualiter*, and the Vicar *adualiter*, and although the Vicarage be spiritual, yet the Corporation is Temporal, which the Pope cannot dissolve. (4) That in this

this case the Vicarage was not dissolved: *vid.* 12 *Fac.* in the Exchequer, *Parry* and *Bank's* Case accordingly, there Vouched.

(18.) In the Canon Law there are two sorts of Vicarages, viz. *Vicaria Temporalis* and *Vicaria Perpetua*; The *Vicaria Temporalis* is compared to the *Commenda Temporalis*, for that such Temporal Vicar *non habet Titulum, sed servit alieno nomine, & proprie Curam non habet*: otherwise it is *de Vicaria perpetua, quæ est incompatibilis cum alio Beneficio, & habet Curam animarum, & talis Vicarius habet Titulum Canonicum*; And a *Quare Impedit* lies against such perpetual Vicarage. *F. N. B.* 32. *b. Regist.* 31. *a.* And such a Vicar shall have a *Furis Utrum* of Lands annext or given to him in perpetuity, by the Statute of 14 *Ed.* 3. *cap.* 17. *vid.* 40 *Ed.* 3. 28. *b.* where *Finebden* said, That although it had been held, that a Vicar should not have Action of his possessions against any person, yet that now the Law is changed in that point; and good reason, when he is endowed to him and his Successors in perpetuity.

*En le Cas de
Commenda.
Davis Rep.
fo. 83.*

C H A P. XIX.

Of Advowsons.

1. *Advowson, what; and why so called;*
2. *Advowsons twofold.*
3. *The great Antiquity of Advowsons; the Original thereof.*
4. *How it was in this Kingdom under the Saxons.*
5. *The word Advowson applicable to other Ecclesiastical Foundations; as well as Churches; what the Famous Lindwood was.*
6. *Advowsons are Temporal, not Spiritual Inheritances.*
7. *Reasons in Law, proving it to be a Temporal Inheritance.*
8. *The difference between Advowsons in Gros and Appendant.*
9. *How Advowson Appendant may remain in the King as in Gros.*
10. *By what words in a Grant an Advowson may pass, or not.*
11. *How an Advowson may be recontinued to the Rightful Patron where he was ousted by Usurpation.*
12. *A Case in Law touching three Avoidances of a Church granted to one man.*
13. *A Question in Law, whether upon such matter of Fact an Advowson remains Appendant, or not?*
14. *Advowsons are devisable by Will, as well as grantable by Deed; what Actions may run in prejudice to the Advowson, or not.*
15. *Whether an Advowson may be Affets; and under what words it may pass or not?*
16. *A Case in Law touching the Advowson of a Vicarage.*
17. *In what Case the VVrit of Right of Advowson lies, or not.*
18. *In what case the Crown shall be put to that VVrit, or not, in case of Usurpation by a Common person.*
19. *A point in Law, whether the King or his Grantee shall have the Presentation, where the King having a Mannor with the Advowson appendant, the Church void, grants the Mannor with the Advowson.*
20. *Of Advowsons there are three Original VVrits at the Common Law.*
21. *The Advowson of a Vicarage, whether it belongs to the Patron or the Parson.*

22 *Whether*

22. Whether an Advowson may properly be said to be a Demefin; several matters of Law in reference to Advowsons Appendant and in Gross, in respect of the King and Common persons.
23. Whether a Donative in the Kings Gift may be with the Cure of Souls?
24. Whether by the Grant of a Vicarage the Advowson of the Vicarage shall pass; The grant of a next Avoidance during an Avoidance, is void.

(1.) **A**dvowson is a kind of Reversionary right of Presentation to an Ecclesiastical Benefice in a man and his Heirs for ever. It is the same which the Canon Law understands by *Jus Patronatus*, or the Right which a man and his Heirs have to present their Clerk to the Ordinary, for a Parsonage or other Spiritual Benefice when it becomes void; and he in whom such Right resides, is called the Patron (a). *Jus Patronatus est Potestas Presentandi aliquem Instituendum ad Beneficium Ecclesiæ Simplex & vacans.* Hostiens. de jure Patronat. *Jus Patronatus est jus Honorificum, Onerosum, & Utile.* It is a Right to present to the Bishop or Ordinary a fit person, by him to be Admitted and Instituted into a Spiritual Benefice when it becomes void. The unlawful possessor is the Usurper, against whom only lieth three Writts; one of the Right, as the Writ of *Right of Advowson*; and the other two of the Possession, As a *Quare Impedit*, and *Darrein Presentment*. And the Incumbent, as to his Right for his Rectory, hath the Writ of *Juris Utrum*. And Advowson is not *Hereditas corporata*, as a Messuage, Land, or Pasture, &c. But it is *Hereditas Incorporata*, as Ways, Common, Piscaries, Courts, &c. which are and be Appendant to Inheritances Corporate. Advowson is a kind of Bastard-French word, sometimes called *Advocatio Ecclesiæ*, either because the Patron thereof, claiming his *Jus Patronatus* therein, *Advocat se* in his own Right unto the same, *eamque esse sui quasi Clientis Loco*; or rather because the Patron in his own Right *Advocat alium* to the Church being vacant, and presents him unto it *Loco alterius, veluti Defuncti* (b). Thence called sometimes *Patroni*, sometimes *Advocati*; for they who originally obtained a Right to Present to any Church, were either the Founders, or Builders, or Benefactors of the same. *Decretal. c. 4. & 24. de jure Patronat. & Plow. 495. Dy. 48. Co. 1. 102. 4. 37. 6. 39. Litt. 119, 120. Patronum faciunt Dos, Aedificatio, Fundus.* And although Advowsons are now, as other Temporal Inheritances, grantable by Deed, and so in that respect cognizable at the Common Law, yet in as much as they are the same which the Canon Law calls *Jus Patronatus*, it cannot be denied, but that

(a) Term. Law, verb. Advowson Westm. 2. 1. 3 Ed. 3. 5.

(b) Skene. de verb. Sig.

they are within the Ecclesiastical Jurisdiction; and therefore although the Patron may have his Action against the Ordinary in a Temporal Court by a *Quare Impedit* for rejecting his Clerk, yet the Ordinary may Decree a *Processus de Jure Patronatus* in the case, to enquire by a Mixt Jury of Ecclesiastical and Lay-men touching the said Advowson or Right of Patronage, according to the Laws and Customs of the Church.

(2.) There is an usual difference taken, between *Advocatio mediatis Ecclesie*, and *Medietas Advocationis Ecclesie*: The former is where two Patrons be, and every of them having Right to Present a several Incumbent to the Bishop, to be admitted into one and the same Church, (for divers may be several Parsons, and have Cure of Souls in one Parish) and such *Advowson* is alike in either of these Patrons, but every of their Presentments is to the moiety of the same Church; and therefore it is called *Advocatio Medietatis Ecclesie*, or as the case may be, *Advocatio Tertia partis Ecclesie*, and the like. The latter, viz. *Medietas Advocationis Ecclesie*, is after partition between Parceners; for although the Advowson be entire amongst them, yet any of them being disturbed to present at his Turn, shall have the Writ of *Medietate*, or of *Tertia*, or of *Quarta parte Advocationis Ecclesie*, as the Case is. And this difference is taken and observed only in the Writ of Right, which is altogether grounded upon the Right of Patronage. But in the *Quare Impedit*, which is only to recover Damages, no such diversity is considered, but the Writ is general, *Presentare ad Ecclesiam*. Dodderige of *Advowsons*, *Lib. 4.* Of Advowsons there are two sorts, The one that is *Gross*, which is Sole or Principal, not adhering or belonging to any Mannor, or to any part or parcel thereof, as of the Right thereof: The other *Appendant* or *Dependant*, or depending on a Mannor, as appertaining or belonging thereto, which is by *Kitchin* termed an Incident that may be separated from the Subject. Again, Sometimes the word *Advowd* or *Avowd* is also used for him who hath a Right in his own Name to present to a Benefice or other Ecclesiastical Living, where you have also (*Advowd paramount*) or the highest Patron, an Appellation peculiar to the King. So that this *Advocatus* is he to whom such *jus advocationis alicujus Ecclesie* belongeth, as that he may Present to the Church in his own, but not in another's Name (c). And *Fitzherbert* useth it in the same signification (d).

25 Ed. 3.
Stat. 5.c. Unic.

(c) Fleta, l. 5.
c. 14 Sect. 1.
(d) Fitzh. G.
R. fo. 39.

(3.) Consonant to the practice at this day touching *Advowsons*, was the Emperour's *Novel*, Decreed about 1100 years since, towards the end of the Fifth Century to this purpose, *That if any man shall erect an Oratory, and his desire be to Present a Clerk thereunto, by himself or his Heirs; if they furnish the Clerk with a Competency,*

petency, and Nominate to the Bishop such as are worthy, they may be Ordained: But if those who are intimated by them be rejected by the Canons, as unworthy of the Ministry, then let it be the care of the most Reverend Diocesan of the place, to present such as in his discretion be shall conceive better of (e). And Panormitan clearly interprets the Emperour's mind herein, and gives us the very meaning and original of the Patron's Right in this point of Advowson; he says, That this is *Jus honorificum, onerosum, & uile*, belonging to any in the Church, for that with the Diocesans consent he hath Founded, Built, and Endowed a Church, he hath given a piece of Ground, *C. nobis c. de jur. Patronat.* and erected a Church thereon, *16. q. 7. c. Monasterium*, and Endowed it, *C. Pise mentis, ibid.* and was therefore qualified with the Right of Patronage. And indeed the Diocesans consent herein is so requisite, that by the Canon Law it seems scarce feazable for a man to be a Patron without it, *Si quis Ecclesiam cum assensu Diocesanis construxit, ex eo Jus Patronatus acquirit. Clement. c. Nobis de Jur. Patron.* And when a Church so erected is by the Consecration thereof actually delivered up and made over (as it were) to God himself, it thenceforth ceases to be of any mans property, or of any Human Dominion; for *Quod Divini Juris est, id nullius est in bonis: § nullius, Inst. de Rer. Divis.* And by what is Recorded in the Life of Bishop Ulrick, it should seem as if the Right of Presentation originally were in the Diocesan; for the Author there sayeth, That if any Erected a Church, the Bishop consented, *Si legitimam Ecclesie dotem in manum ejus Celsitudinis dare non differret, &c.* And after the Endowment and Consecration thereof, the care of the Altar was committed by him to the Priest, and the Advowson firmly conveyed to the lawful heir, by the putting on of a Robe: *Author vite Udalrici, c. 7. p. 52. August. Vindel. 1595.* But the Bishops understanding this as a matter more of Care than of Power, as appears by these moderate expressions of *Nominare, Præsentare*, or *Commendare*, they were willing the Lay-Patron (for his better encouragement to such Pious works) should share with them in this Privilege, which Panormitan calls *Jus honorificum*, yet so, as that this transference of the Bishops unto Lay-Patrons, should still remain under such a Limitation, as that it should be necessary for the Patron to have recourse to the Bishop for the qualifying his Clerk for the Rectory by Ordination; And the Bishop's prudent compliance with Lay-Patrons in this matter was not in those days without good reason, if we consider what a paucity of publick Churches there then were, inso much that for want or instead thereof, they frequently then said Prayers under a Cross in the open Field, as is reported of our own Ancestors in the Peregrination of Wilibald; *Sic mos est Saxonice gentis, &c. non Eccl.*

(e) Novel.

sed

sed Sanctæ Crucis Signum, &c. diurnæ Orationis sedulitatem solent habere. Hodeperic. Hierosolym. Wilibad. Extat ad Canisium, Tom. 4. Antiq. Lett. par. 2. pag. 486. Edit. Ingolst 1603. Yea, and where perhaps some Churches were, many of them were no better than those mentioned by *Affer* Bishop of *Shirburne* in King *Alured's* days, which were of so mean a structure, that frequently the wind entering *per parietum rimulas*, did blow out the Candles set before the Reliques; which gave occasion to that ingenious Prince to teach us by his dexterity the mystery of making Lanthorns *Ex Lignis & Bovinis Cornibus*.

(4.) In the Infancy of the Christian Faith in this Island under the Saxons, several particular Lords Grand Seignories (*Regis ad Exemplum*) erected particular Churches, and having Endowed them with Lands, reserved to themselves and their Successors for ever a right and power to confer them on such as were meetly qualified for the same; And this they did in imitation of those Kings, who then Reigning here, erected Cathedrals, Abbies, Priors, Churches, &c. (f).

(f) Co. 2. par.
Instit. Dod.
Treatise of Advowson.

(5.) An Advowson, being a right of Presentation (as aforesaid) reserved by a Founder to himself, his Heirs and Successors, is applicable to other Ecclesiastical Foundations, as well as those of Churches, as appears by the several *Quare Impedit*s brought on several occasions (g): so that albeit it hath been said, that by the Grant of a Church the Advowson passed (b), and when he gave the one, he gave the other; yet is the word *Advowson* not improperly applicable to any thing wherein a *Quare Impedit* will lie. And he in whose Right such Presentation is vested, is by the Provincial Constitutions of this Realm termed *Advocatus Ecclesiæ*, because (as the Constitution hath it) *tueri & defendere Ecclesiam & ejus jura teneatur, ad instar Advocati. qui in Judicio causam alicujus defendit.* Lindwood *Provin. Const. de Foro Comp. cap. Circumspecte, ver. Advocatus.* Which every Patron is obliged to do; whence *Patronus* and *Advocatus Ecclesiæ* are in effect Synonymous; yet in Lindwood we have the Question put, whether there be any difference inter *Patronum & Advocatum Ecclesiæ*. Lind. *Const. Pro. de homicidio*; cap. *Sacri Gloss. ibid.* Where though the prevailing opinion be for the Negative, yet you will also there find very Orthodox Authority for the contrary, and that *Advocatus intelligitur non pro Patrono, sed pro Defensore Ecclesiæ*: *Gloss. ibid.* as appears there by Lindwood that Famous Canonist *totius Orbis Britannici*, who being Doctor of Law, Chaplain and Official to the Archbishop of *Canterbury* in the time of *H. 5.* was by reason of his great Experience and Abilities in *National Laws* as well as *Provincial Constitutions*; sent as his Ambassador to the Crowns of *Spain* and *Portugal*, and at his Return

(g) As in case
of Disturbance
to a Prebendary
7.R.2. Qu. Imp.
21.13 R.2. Bre.
643. Or of Disturbance in a
Presentation to
a Vicarage, 5 E.
3. 20. To a Pro-
vost, 17 E. 3.
20. To a Chap-
pel, 17 E. 3. 12.
(b) Per Par-
ning, 7 Ed. 3. f.
Qu. Imp. 19.

turn about *An.* 1422. compiled what now is extant to his immortal Memory, and dedicated the same to the said Archbishop, it was after about *An.* 1505 (being first revised by *Wolfgangus Hopylius*) printed at *Paris*, at the cost and charges of *William Bretton* Merchant of *London*. Mention hereof is here made, in regard of the plentiful use here made of this Eminent Author in this Ecclesiastical Abridgment, and that rather in the midst of this Subject touching *Advowsons*, as presuming, that for the reason aforesaid a *Quare Impedit* will not lie in case of this digression.

(6.) The Right of Patronage is, it seems by the Common Law, a real Right fixed or vested in the Patron or founder in the Church, wherein he hath as absolute a property and Ownership as any man hath to his Lands and Tenements, or any Freehold whatever (i); And that the Advowson or Patrons Right to Present is a Temporal and not a Spiritual Inheritance. For at the first Creation of a Mannor, if Lands were given to erect a Church thereon, the Advowson thereof became appendant to that Mannor, and reputed as parcel thereof, which being Temporal, the other became so also, as an Accessary to the Principal: for which reason such an Advowson passeth by the Grant of the Mannor *cum pertinentiis* (k). Yea, it hath been adjudged, That by the Grant of a Mannor, without making any mention of the Advowson, the Advowson also passed, because it was parcel of, and appendant to the Mannor (l). And it hath been ever held, That by the Common Law an Advowson is a Temporal Inheritance, for that it lieth in Tenure, and may be holden either of the King, or of a Common person; and hath been held of the King in *Capite*, or in Knights Service (m). And where a *Quare Impedit* hath been brought, the Plaintiff hath counted, that the Defendant held the Advowson of him by Homage and Fealty (n). And it hath been agreed, that an Advowson doth lie in Tenure, and that the Lord may distrain in the Glebe-Lands for Rents and Services, the Patron's Cattel, if any be there found upon the Land, but not the Cattel of a Stranger (o).

(i) The Abbot of *Webbeck's* Case. (j) The Prior of *Cosla-Acre's* Case *vers.* the Prior of *Buckley's* Hugh's Abridg. *verb. Advowson*. Sect. 3. Sect. 4.

(7.) Other Reasons, it seems, there are at the Common Law, which prove, That an Advowson is a Temporal Inheritance; for that a Writ of Right of Advowson lieth for him, who hath an Estate in an Advowson in Fee-simple, or right of an Estate therein to him and his heirs in Fee-simple. Which Writ being *Quod clamat tenere de te* (p), doth suppose a Tenure, and lieth not only for the whole Advowson, but also for some part thereof. As also because a *Præcipe quod reddat* lieth for it, as hath been Adjudged (q).

(r) 35 Eliz. C. B. Grocher and Dormer's Case Poph. 22. Vid. Co. 5. par. 40. & 2 Par. 74. & 1. par. 56. acq. (s) Vid. 9. H. 6. 57. Co. 10. par. 55. *The Chancellor of Oxford's Case.* (t) Parsons Law, 39, 40. vid. the Authorities there vouched. (u) Co. Inst. 1. par. (x) 13 Eliz. Dyer 299. in *Evileigh's Case.*

As also that a Common Recovery may be suffered of an Advowson, as hath been likewise Adjudged (r). As also because an Advowson as other Temporal Inheritances, may be forfeited by Attainder of Treason or Felony, or lost by Usurpation, six months Plenary, Recusancy, Outlawry, Negligence or Lacks of Presentment, Translation, or Cesser, and given away in Mortmain (s). As also for that the Wife shall be endowed thereof, and have the third Presentment, and the Husband shall be Tenant thereof by the Courtlesie; also it is successively devisable among Coparceners, that the Priority of Presentment shall be in the eldest Sister; likewise it may pass by way of Exchange for other Temporal Inheritance; and albeit during the vacancy of the Church it be not in it self valuable, yet otherwise it is as to an Incumbent; and by Grant of all Lands and Tenements an Advowson doth pass, if not by Livery, yet by Deed is transferable as other Temporal Inheritances (t), and pass with the Mannors wherunto they are appendant by Prescription, unless there were before a severance by Grant, Deed, Partition, or other Legal Act (u); which Prescription is so requisite to Appendency, as without which it cannot well be at all (x).

(8.) An Advowson in Gros is understood as under a more beneficial qualification than that which is Appendant; and that which is Appendant may by severance become an Advowson in Gros: and therefore in the Case, where a man being seized of a Mannor whereto an Advowson was Appendant, and by Deed granting one Acre belonging to that Mannor *und cum Advocacione Ecclesie*, did further by the same Deed give and grant the said Advowson; the Question was, whether the Advowson did pass as Appendant to the Acre, or as an Advowson in Gros? And the better Opinion was, That by that Grant the Advowson was severed from the Mannor, and was become in Gros; for that the Deed shall be taken most beneficial for the Grantee to have the Advowson in Gros, and not as Appendant to the Acre. But in that case it was Agreed, If the whole Mannor had been granted, then the Advowson had passed as Appendant, and not in Gros (y). Yet an Advowson, Appendant to a Mannor, descending to divers Coparceners, making Partition of such Mannor without mentioning the Advowson, remains Appendant, notwithstanding such Division and Severance from the Mannor (z): Yea, although the Mannor of D. to which an Advowson is Appendant; be granted, and by the same Deed the Advowson also of the Church of D. So, as it is named no otherwise than in Gros, yet it shall thereby pass only as Appendant (a).

(y) 33 H. 8. Dyer 48. vouched per Hughes in his Abridg. verb. Advowson. Sect. 4. ubi. To what things Advowsons may be Appendant, and to what not; and how in several self Cases, vid. Hughes, ubi supr. (z) Co. 8. par. 3. *Wint Weild's Case.* (a) By the Opinion of Finchden, in 43 Ed. 3. Hughes, *ibid.*

(9.) If

(9.) If the King makes a Lease for life of a Mannor, to which an Advowson is Appendant, without making any mention of the Advowson, the Advowson remains in the King as in Gross, as was granted by the Justices: And it was said by them, That in such case by Grant of the Reversion, *Habendum* the Reversion with the Advowson, the Advowson passeth not to the Patentee, for that the Advowson was severed, and became in Gross as to the Fee (b). And in another Case, where it was found before Commissioners, That A. was seized of a Mannor, to which an Advowson was appendant, and that he was a Recusant convict; whereupon two parts of the Mannor were seized into the Kings had, who leased the Mannor, with Appurtenances; and all other profits and commodities, and Hereditaments to the same belonging, unto J. S. for 21 years, if A. &c. and afterwards the Church became void. In this case it was held, That albeit there was no mention in the seizure of the Advowson, yet the Presentment belonged to the King, and that the King alone should Present. Secondly, That there were no words in the Kings Grant to J. S. to carry away the Advowson from the King, and that notwithstanding that Grant, the Advowson remained still Appendant to the Mannor (c).

(10.) By words implying merely matter of profit or things gainful, as *Cum omnibus commoditatibus, Emolumentis, proficuis, advantagiis*, and the like, an Advowson will not pass, because it is contrary to the nature of an Advowson regularly; and therefore the Advowson of a Vicarage appendant to a Prebend, passed not by a Lease with such words of several parts of the Prebend to which such Advowson was Appendant (d). Nor will an Advowson appurtenant to a Mannor, pass by the Grant of an Acre of Land parcel of that Mannor *cum pertinentiis*, otherwise, if the Grant be of the Mannor it self *cum pertinentiis* (e). Yet in a Case where the King being seized of a Mannor to which an Advowson was appendant, granted the Mannor to J. S. for life, and then granted the Mannor to J. D. after the death of J. S. *Habendum cum Advocatone*, and then by Parliament the King reciting both the Grants, confirmed them by Parliament: yet it was adjudged in that case, That the Advowson did not pass (f). Nor will an Advowson (if once Appendant) pass without special words of Grant thereof, which may not be strained in the construction thereof to an unusual or unreasonable sense, for which reason an Appropriation will not pass by the name of an Advowson; but (as aforesaid) an Advowson of a Vicarage may be Appendant to a Prebend; all which hath been resolved in the fore-cited Case (g). And if Tenant in Tail be of a Mannor to which an Advowson is appendant, the Church being full, and he grants *proximam Advocatorem*, and then dies;

(b) Co. 11.
fol. 47. *Liford's Case*.

(c) Mich. 14.
Jac. C. B. rot.
651. The
Chancellor of
Cambridge
and *Walgrave's*
Case.

Hob. 127.
(d) Mich. 16.
Jac. C. B. rot.
1877. *Jo. London*, and the
Collegiate
Church of St.
Mary South-
well's Case.
Hob. Rep.

(e) Trin. 8.
Jac. B. R. *Walker* and *Bola's*
Case.

Bolstr. 1. par.
fol. 35.

(f) 33 H. 6.
33. vouched in

Cult and the
Bishop of Co.
ventry and
Litchfields

Case. Mich.
10 Jac. C. B.

Rot. 2642.
Hob. Rep.

(g) Mich. 16.
Jac. C. B. dict.
London's Case.

(b) Trin. 8.
Jac. B. R.
Bollfr. 1.
par. 35.

by his death the Grant becomes meerly void, as was also Resolved in *Walter and Bould's Case* (b).

More's Rep.

In a *Quare Impedit*, The Case was between the Chancellor and Scholars of Oxford, and the Bishop of Norwich, and others. The Plaintiff Counted upon the Statute of 3 Jac. That J. S. being Owner of an Advowson, 2 Jac. was a Recusant convict, and that afterwards the Church became void, and so they by the Statute ought to Present. One of the Defendants pleaded, That the Advowson was appendant to a Mannor, and that two parts of the Mannor were seized into the Kings hands by Process out of the Exchequer, and that the King by his Letter Patents granted the Two parts to the Defendant with the Appurtenances, and granted also all Hereditaments (but Advowsons were not mentioned in the Letters Patents) and so said, the Presentation did belong to the Defendant: it was Resolved, That the Advowson did not pass by the word [Appurtenances] without mention of Advowson or words *Adeo plena & integra, & in tam amplo modo & forma*, as the Recusant had the Mannor.

(i) Co. 1. par.
Instit. 363.

(11.) In case a Patron be Outlawed, and the Church becoming void a Stranger doth usurp, & presents his Clerk to the Avoidance, and Six months pass, and afterwards the King, being intitled to the Avoidance by reason of the Outlawry, bring a *Quare Impedit* against the Incumbent as being in wrongfully, and remove him: By this means the Advowson is recontinued again to the Rightful Patron, whereof he was ousted by the Usurpation, who upon the reversal of the Outlawry shall Present, in case the Church becomes void again (i).

(k) Mich. 18.
Eliz. C. B.

(12.) A man hath Three Avoidances granted him of one Church at one time and by one Deed; The Church becomes void; the Grantor by Usurpation presents his Clerk, who is Admitted, Instituted, and Inducted, afterwards the Church becomes void again. In that case the Grantee shall present to the Second Avoidance, for that the former Presentation made by the Grantor usurping, did not put the Grantee out of all the Avoidance; and Adjudged accordingly (k).

(13.) A. seized of a Mannor with an Advowson appendant, presented B. who was Admitted, Instituted, and Inducted; afterwards A. sells the Mannor to which the Advowson was appendant, unto J. S. The Church becomes void by the death of B. whereupon the Queen 15 Feb. 1588. Presents J. D. by these words, viz. *Per mortem naturalem Incumbentis ibid. vacant.* who thereupon 20th of the said Feb. was Admitted, Instituted, and Inducted by Letters of Institution, *Per Dominam Regiam veram & indubitatam Patronam.* The said J. D. dies: The King presents R. in these words,

words viz. *Ad nostram Presentationem sine expleto jure, sine per Lapsum Temporis, sine alio quocunque modo spectant.* The only Question was, Whether, notwithstanding all this matter, the Advowson did remain Appendant or not? And it was Adjudged by the Court, That the Advowson remained Appendant, notwithstanding the Queens Presentation of *J. D.* For it appeared, there was no colour of Title to the Queen to present; no Lapse; for the Presentation, Institution, &c. were all in the same month, wherein the Avoidance was: And it was no Usurpation by the Queen, because the Presentation supposed a Right where none was, and so was void; for the Queen meant to do no wrong: And upon the same reason the Presentation of *R.* afterwards by the King was void. And it was then further holden by the Court, That the Presentation of *J. D.* being void, it was but a Collation of the Bishop, which makes no disappandancy, nor so much as a plenarty against the Rightful Patron, but that he may bring his *Quare Impedit* when he will; and if the Bishop receive his Clerk, the other is out *ipso facto* (1).

(14.) Although an Advowson be a kind of Reversion of a right of Presentation to a Living or Benefice called Spiritual, yet it is now in the nature of other Temporal Inheritances; and therefore he that hath this Right in him, may either devise it by Will, or grant it by Deed, in Fee, or for life, or for years, as other things (m). And in regard an Advowson or *Jus Patronatus* refers to and respects not the Oblations and Tithes belonging to the Church, but rather the Building thereof, with the Ground whereon it is built, and the Endowment thereof; if therefore any debate or controversy should happen to arise touching any of these last mentioned, it might prejudice the Patron as to his Right to the Advowson; but if the controversy be only touching the other, viz. the Oblations or Tithes, whether Great or Small, the *Jus Patronatus* will remain good and entire to the Patron notwithstanding such Controversie, provided the Suit doth not extend & be for a fourth part of the whole belonging to the Church, *Lindw. de Foro Comp. cap. Circumspiciet, verb. Item si Rector, & gl. ibid. verb. quarta pars.* And he to whom the Right of Advowson of any Church appertains, is termed *Avowè* for distinctions sake, to discriminate him from those who sometime Present in the Name of another, as a Guardian that presents in the Name of his Minor; as also to difference him from such as have only for term of their Lives, or of years, or by Intrusion or Disseisin, the Lands to which an Advowson appertains; the *Avowè*, properly and strictly taken, being only he who may Present in his own right and in his own name (n).

(1) Hill. 17.
Jac. C. B. 101.
1840. *Gawdy*
and the Arch-
bishop of
Canterbury
and *Rene's*
Case. Hob.
301. *Hugh's*
Abridg. ver.
Advowf. Sect.
6 Sect. ult.
(m) C. 5. 56.
15 H. 7. 8.

(n) Britton,
cap. 29.

(15.) It hath been Adjudg'd, That an Advowson belonging to a *Prebend* will not pass by a lease thereof, albeit it hath in it these words, *viz.* Commodities, Emoluments, Profits and Advantages; because all these four words being of one sense and nature, imply things gainful, which is contrary to the nature of an Advowson regularly, as aforesaid; yet an Advowson may be yielded in value upon a Voucher, and may be Assets in the hand of an Executor (o); and in the aforesaid Case of *London* vers. *&c.* it is said, That an Appropriation, nor the Advowson of it, will not pass by the name of an Advowson; yet an Advowson will be contained under the name of a Tenement (p). And where the King granted that Monks should have all their possessions of the Abbey in the Vacation for their sustentation; Ruled, that they should not have the Advowsons, because no sustentation arose from them (q); nor will an Advowson, though it be appendant, pass in the Kings Grant, without special words (r); yet in the Case of a Recusant convict, to whose Lands an Advowson is appendant, the seizure of Two parts of his Land for the King is a Seizure by consequence of two parts of the Advowson, without mention of it (s); and if the King have but Two parts of an Advowson, yet he shall Present alone, for no Subject can be Tenant in Common with the King; who (though he be no party to a *Quare Impedit*) yet if his Title appear clear for him against both parties, shall have a Writ awarded for him to the Bishop (t). Or if the King joyn Issue in a *Quare Impedit*, which is not found fully for him, yet if Title do any way appear, the Court must award a Writ to the Bishop for

(o) Dict. Case
London vers.
the Collegiate
Church of St.
Mary South-
well.

(p) 44. Ed. 3.
33. cited in
dict. Case.

(q) 39 H. 6.
cited in dict.
Case.

(r) Mich. 14.

Jac. C. B. Rot.
647. Chancel-
lor, &c. of
Cambridge
vers. *Walgrave*.
Hob. Rep.

(s) Case *ibid.*

(t) *Ibid.*

(u) Dom. Rex.
ver Bishop of
Rocheſter, and
Jackson his
Clerk: Hob.
Rep.

(16.) *A.* brought *Quare Impedit* against *D.* The Plaintiff counted that the Defendant had disturbed him to Present *ad Vicariam de D.* and shewed, That the Queen was seized of the Rectory of *D.* and of the Advowson of the Vicarage of *D.* and by her Letters Patents gave unto the Plaintiff *Rectoriam prædictam cum pertinentiis, & etiam Vicariam Ecclesie prædictæ.* And it was holden by the whole Court, That the Advowson of the Vicarage by these words doth not pass; nor so in the Case of a Common person, much less in the Case of the King: But if the Queen had granted *Ecclesiam suam* of *D.* then by *Valmſley* Justice, the Advowson of the Vicarage had passed (x).

(x) Mich. 31.
& 32 Eliz. C.
B. Rot. 452.
Case *Aſtegel*
vers. *Dennis*.
Leon. Rep.

(y) Term.
Law verb.

Quare Impedit.

(17.) Although he, who after the death of a Parson Incumbent hath Right of Presentation in him, doth not upon a Disturbance bring a *Quare Impedit* nor *Darrein Presentment*, but suffereth a Stranger to usurp upon him; yet he may have a Writ of Right of Advowson; but this Writ lieth not for him, unless he claim to have the Advowson to him and his Heirs in Fee-simple (y); which Advow-

Advowson is valuable, though the Presentment be not (x).

(18.) The Queen seized of an Advowson being void, the Ancestor of P. Presented, and gained it by Usurpation, and then the Church being void he Presented again, his Clerk dies, and then the Queen grants the Advowson to T. the Plaintiff, who brings a *Quare Impedit* in the Queens Name, supposing that this Usurpation did not put the Queen out of Possession: It was argued, That the Grant could not pass without special words, because it is in the nature of a *Chose in Action*: And *Dyer*, *Mead*, and *Windham* held, That this Usurpation did gain possession out of the Queen, and that she should be put to her Writ of Right of Advowson. But the Opinion of *Anderson* Chief Justice was clearly, That the Queen was not out of Possession; for he said, That it was a Rule in our Books, that of a thing which is of Inheritance, the act of a Common person will not put the Queen out of possession: but if she had only a Chattel, as the next Advowson, then perhaps it is otherwise. But *Mead* and *Windham* very earnestly held the contrary, relying on the Book of 18 E. 3. 15. where *Sbard* said, That if the King had an Advowson in his own Right, and a Stranger, who had no Right, happen to Present, it puts the King out of Possession; And the King shall be put to his Writ of Right, as others shall (a). The Defendant alledged Two Presentations in his Ancestor after the Title of the King, and demanded Judgment if the King should have a Writ of Possession, and the Plea was admitted to be good. But after *Pasch. 25. Eliz.* Judgment was given for the Queen, for that she might very well maintain a *Quare Impedit*; and the two Presentments did not put her out of possession (b).

(19.) In a *Quare Impedit* by G. against the Bishop of L. and D. Incumbent: The Case was, That a Mannor with the Advowson Appendant was in the hands of the King, and the Church became void, and the King grants the Mannor with the Advowson: if the Grantee shall have the Presentation, or the King, was the question. All the Justices held clearly, That the Advowson would not pass, because it was a Chattel vested. And *Periam* said, that in case of a Common person, without question an Advowson appendant would not pass by such Grant, for if the Father die, it shall go to his Executor: but if it be an Advowson in Gross, in case of a Common person there is some doubt: But in the Principal Case all the Judges held *ut supra*, and said, That so it was in 9 E. 3. 26. *Quare Impedit* 31. and in *Dyer* in the Case of the Church of *Westminster*: But *F. N. B.* is contrary, 33 N. (c).

(c) Trin. 31.

Eliz. C. B.

Smalwood

vers. Bishop

of *Lichfield*

Leon. Rep.

(a) Vid. 57.

E. 3. 13. b.

18 E. 3. 16.

(b) *Pasch. 28.*

Eliz. C. B.

Tardly vers.

Pelean.

Owen Rep.

(c) Mich. 29.

& 30. Eliz.

Sir. *Tho. Gorge.*

vers. Bishop of

Lincoln and

Dalton incum-

bent. Owen.

Rep.

- (20.) Of Advowsons there are three Original Writs, whereof one is a Writ of Right, the other two of Possession, viz. *Darrein Presentment*, and *Quare Impedit*. And where an Advowson descendeth unto Parceners, though one present twice, and usurpeth upon his Co-heir; yet he that was negligent shall not be clearly barr'd; but another time shall have his turn to present when it falleth (d). And by the Statute of 3 Jac. 5. every Recusant Convict is utterly disabled to Present to any Ecclesiastical Living, or to collate or Nominate to any Donative whatsoever, the Advowson of every such Recusant being left to the disposition of the Universities of Oxford and Cambridge (e). Also by the Statute of 13 E. 1. 5. it is directed, what Action shall be maintained by him in the Reversion who is disturbed to present after the Expiration of a particular Estate; where there is also provided a Remedy for him in the Reversion or Remainder, or others that have right, where there is an Usurpation of an Advowson during any particular Estate: And that Judgments given in the Kings Courts touching Advowsons shall not be void by Surmizes, but by lawful means (f). Likewise it is Statute-Law to hold, That Advowsons shall not pass from the King but by Special words; for when the King doth give or grant Land or a Mannor with the Appurtenances, unless he make express mention in his Deed of Advowsons of Churches, when they fall, belonging to such Mannor or Land, they are reserved to him, notwithstanding the word [*Appurtenances*,] albeit among Common persons it hath been otherwise observed (g); nor is it lawful to purchase an Advowson, during the dependency of a Suit at Law concerning the same (h).
- (d) St. 13. E. 1. cap. 5.
Vid. Rast. pla. fo. 151. 144. 496. & Stat. 2 & 3 Ed. 6. 13.
- (e) St. 3. Jac. c. 5.
- (f) St. 13 E. 1. cap. 5.
- (g) St. 7 Ed. 2. 15. & Co. lib. 10. fo. 63. & Dyer, fo. 350.
- (h) St. 13 Ed. 1 c. 49.

- (21.) If a Feme Covert be seized of an Advowson, and the Church becomes void, and the Wife dieth, the Husband shall Present (i). Where a Parson and Vicar be Endowed in one Church and the Vicarage becomes void, the question is, To whom the Advowson of the Vicarage doth belong, and who in that case shall be said to be the Patron of the Vicarage? Whether the Patron of the Parsonage, or the Parson? It seems in the Books at Common Law, the Judges and the Court were divided in Opinion, touching this point (k); some of the Judges were of Opinion, That the Advowson of the Vicarage appertains to the Parson; Others, that it belongs to the Patron: Such as inclined, that it is in the Patron (l), gave for reason, That the Ordinary cannot make a Vicar without the assent of the Patron, 5 E. 2. *Quare Impedit* 165. puts the Case, That although the Vicarage be Endowed with the assent of the Patron and Ordinary, yet the Advowson of the Vicarage
- (i) Dyer 26, 9 Ed. 4. 47. a. Co. sup. Lit. 120. 14 H. 4. 12.
- (k) 17 E. 3. 51. Farsons Law, cap. 23.
- (l) Mich. 16 E. 3 Fitz. 2. Imp. 145. by a Par. ninge and Hill.

doth remain in the Parson, because the same is parcel of the Advowson of the Parsonage (m). And 16 E. 3. *Grants*, 56. it was a question, Whether by the Grant of the Advowson of the Church, the Advowson of the Vicarage did pass? and there it was said by *Stone*, That it doth pass as Incident to the Parsonage (n). And in regard the Vicar is as the Parsons Substitute, and his Endowment originally only as a Maintenance for him in officiating the Cure for the case of the Parson, whose Concern it is to see that he be a fit and able person, sufficient for the Cure, it should thence seem rational that the Parson should be his Patron, to Present such an one to the Vicarage as shall be sufficient for the Cure; for which reason the Patronage of the Vicarage should seem rather to belong unto the Parson, than to the First Patron of the Parsonage Appropriate.

(m) Parsons
Law. c. 23.

(n) Ibid. 17 E.
3 *Grants*, 66.
13 R. 2. *Ju-
risdiction*, 19.
16 E. 3. *Mans
Defaults*, 166.

(22.) But Advowson cannot, it seems, at the Common Law be called a *Demefne*, for that it is not such a thing as a man hath a Manual occupation or possession of, as he hath of Lands, Tenements, and Rents whereof he may say in his Pleading, That he was seized thereof in his Demefn, as of Fee, which he cannot say that hath only the Advowson of a Church, because it lies not, as the other, in Manual occupation. And therefore in the case of Advowson of a Church, he may only say that he was seized as of Fee, and not in his Demefn as of Fee (o), whether it be an Advowson in Gros or Appendant, which Appendency is held to be for the most part by Prescription, and must relate to such things as are in their own nature of a perpetual continuance; for which reason it is, That Advowsons cannot be said to be Appendant to Rents, Services, and the like, because such things are extinguishable (p). And although an Advowson be not properly said to be a Demefn, yet it may be Appendant to a Demefn, as of Lands or things Corporeal and Perpetual, and therefore (as supposed) not to an House of habitation, merely *quatenus* such, yet to the Soyl, whereon the House is erected; whereby the Law (which hath the clearest prospect of Casualties at a distance) hath provided, that the Advowson shall stand, though the House fall (q); but an Advowson Disappendant and in Gros, which a man hath alone, and not by reason of any other thing, but severed from the Lands to which it was Appendant, such an Advowson is exempt from divers prejudicial Incidents, which the other, *viz.* the Appendant, cannot well avoid. And where a Subject or Common person hath an Advowson Appendant to a Mannor, and there be an Usurpation upon

(o) Litt. Te-
nures, l. 1.
c. 1. *verf. fin.*

(p) Co. 4. *Ter-
ringham's Case*.

(q) 10 H. 7. 13.
b. by *Keeble*.
Parf. Law.
Cap. 2. *Ubi*,
16 H. 7. 9. by
Rede.

- upon him, by a Presentation made by a Stranger, whose Clerk is in for Six months; though this makes the Advowson of such Common person Disappendant to his Mannor; ~~but~~ it is otherwise in case of the King, who may grant the Advowson notwithstanding such Usurpation; for a man cannot put the King out of possession either by Presentation or Usurpation, as hath been Adjudged (r), Nor doth the King's Presentation by Lapse sever the Advowson from the Mannor, or cause it to become disappendant, as in *Gawdy's* Case against the Archbishop of *Canterbury* and others, was likewise Adjudged; in which Case it was also said by *Hobart* Chief Justice, That neither doth a wrongful Collation of the Bishops make any Disappendency, nor any binding Plenarty against the true Patron; but that he may not only bring his *Quare Impedit* when he please, but also Present upon him seven years after (s). Also, whereas It was said before, That an Advowson cannot be Appendant to the things Extinguishable, as to Rents, Services, and the like, so it seems at the Common Law an Advowson in Possession cannot be Appendant to a Reversion expectant upon an Estate for life; for the Case was, The King seized of a Mannor with an Advowson Appendant, granted the Mannor to *J. S.* for life, and then granted the Mannor to *J. D.* after the death of *J. S.* *Habendum una cum Advocatione*; and then by Parliament the King reciting both the Grants, confirmed them by Parliament, yet the Advowson passed not (r). Finally, whereas also it hath been Adjudged (as aforesaid) that the King cannot be put out of Possession either by Presentation or Usurpation, this seems to refer only as to the Kings Advowson, and not as to his present Presentation; for the Opinion of Sir *H. Hobart* Chief Justice is, That although the King may be dispossessed of his present Presentation, he cannot be so of his Advowson, and therefore he may still grant it, notwithstanding the Usurpation, as was Judged in a Writ of Error, upon a Judgment given to the contrary, between the King and *Campion* for the Vicarage of *Newton Valence* (u).
- (r) Mich. 13. 14 Eliz. *Bendloes* dit *l'Opinion del Court.* Hob. Rep. vid. 16 E. 1 E. Qu. *Impedit*, 67.
- (s) Hill. 17. Jac. rot. 1840. Case *Gawdy* verf. Archb. of *Cant.* & alios. Hob. Rep.
- (t) Case of the Abbess of *Sion*, 38 H. 6. 33. Cit. in *Celt* and *Glover*. verf. Bishop of *Conventry* and *Lichf.* Mich. 10. Jac. Rot. 2642. Hob. Rep.
- (u) Pasch. 14 Jac. rot. 1030. Lord *Stanhope* verf. the Bishop of *Lincoln*, and others. Hob. Rep.

(23.) A Donative in the Kings Gift may be with Cure of Souls, as the Church of the *Tower of London* is a Donative in the Kings Gift with Cure; as in the Case of *Fletcher* and *Mackaller*, where Information was brought upon the Stat. 31 Eliz. of Simony for procuring him to be promoted to the Church of the *Tower* for money; and *per Curiam*, it well lies (x).

- (x) Mich. 9. Car. B. R. inter *Fletcher* and *Mackaller*.

(24.) The Queen hath the *Advowson* of the Vicarage of *H.* and grants the Vicarage to *J. S.* It was the Opinion of all the Justices, that the *Advowson* passeth not; for that the Vicarage is another thing than the Advowson of the Vicarage (y). The Queen (y) Cro. par. 1 seized of a Mannor, to which an *Advowson* was appendant, granted the Mannor *cum Advocatione Ecclesie*, the Church being then void: It was Adjudged the Avoidance did not pass, but the Queen should (z) Hill. 29. Present *pro hac vice* (z). And in the Queen and *Huslie's* Case it Eliz. Sir Tho. was Resolved, That a double Presentation would not put the Queen Georges' Case. out of possession, if she hath Right (a). And in *Stephens and Clarks* Mores Rep. Case it was Resolved, That the Grant of the next Avoidance to one (a) Mores Rep. during the Avoidance, is void in Law (b). (b) More. ib.

CHAP. XX.

Of Appropriations.

1. *The great Antiquity of Appropriations; a conjecture of their Original; whether Charles Martel was the occasion thereof? they were prohibited in England Anciently by the Pope; whether they can be otherwise than by the King, or some Authority derived from him?*
2. *How the end and use of Appropriations is changed at this day from what it was in the Original Institution thereof.*
3. *Appropriators why called Proprietarii; The care of R. 2. in making Provision for the Vicar in case of Appropriations; Requisites of Law to make an Appropriation.*
4. *A further discovery of the Original use, and ends of Appropriations, and under what qualifications.*
5. *Whether Appropriations were Anciently grantable to Nunneries?*
6. *Appropriations not now to be questioned, as to their Original.*
7. *A Vicarage endowed may be Appropriated, but not a Parson.*
8. *Three considerable Points of Law resolved by the Justices touching Appropriations.*
9. *Whether an Advowson may be Appropriated without a Succession? Appropriations usually were to Corporations or Persons Spiritual.*
10. *How a Church Appropriate may be disappropriated.*
11. *In Appropriations the Patron and his Successors are perpetual Parsons.*
12. *Whether an Appropriation of a Parsonage without endowment of the Vicarage be good? Also, whether an Appropriation may be made without the Kings License?*

(I.) **I**T is a Question at this day undecided, whether Princes or Popes were the first Authors of Appropriations: the practice whereof by each of them is of great Antiquity; but whether in imitation of *Charles Martel's* Sacrilegious President (the first by whom Tithes were ever violated in the Christian World) is but a Supposition rather than any assertion among Historians

rians. It was long since Traditionally Recorded in History, that about the year 650. when the said *Charls Martel*, Father of *Pipin*, after King of *France*, in defence of his Country against the *Huns*, *Goths*, and *Vandals*, had slain no less then 34500. of those Infidel *Sarazens* in one Battle, he did not restore to such of the Clergy of *France* their Tithes, as from whom under a fair pretence of supporting the charges of the War thereby, he had (upon a Promise of Restitution thereof so soon as the War should cease) obtained the same; but instead thereof gratified such of the Nobility, as had assisted him in the War, by the grant thereof to them and their Heirs for ever. But whether this Sacrilege (if it be true) had such a malign influence upon succeeding Princes in After-ages, and other Kingdoms, and also upon the Popes, as some Historiographers do more than conjecture, is not so evident; as that which is reported by *Ingulphus* Abbot of *Crowland*, touching Eight Churches to have been Appropriated to that Abbey by several *Saxon* Kings; and though by their Charters, yet whether by such exclusively to all Ecclesiastical Authority, is not so certain, as that *William* the Conqueror, without asking leave of the Pope, Appropriated three Parish-Churches to the Abbey of *Bataile*, which he built in memory of his Conquest; and his youngest Son *H. I.* nigh twenty in one day to the Cathedral of *Sarum* by his Letters Patents, together with the Tithes of those Parishes which his elder Brother *William*, surnamed *Rufus*, had depopulated and disecclesiated in *New Forrest* in *Hants*hire. Notwithstanding which, the Pope (who understood his Supremacy in matters Ecclesiastical better than to part with it upon any Presidents of Temporal Usurpations) doth frequently in his Decretals, without any contradiction, rather assume than arrogate this Right unto himself, as a Prerogative of the Apostolick See, and granted to several Religious Orders this Priviledge of taking Ecclesiastical Benefices at Lay-mens hands by the mediation of the Diocesan, who at a moderate and indifferente rate (as one Moiety of the Annual profits of the Benefice) was to be a Medium or Expedient between the Religious House and the Incumbent; but in process of time, partly by the remissness of the Bishops in that point, and partly by the Covetousness of the Monks and Friars in those days, the Incumbents proportion became at last so inconsiderable, that Pope *Urban* the Fifth by his Legat *Orbodon*, about the year 1260. was forced to inhibit all the Bishops here in *England* from Appropriating any more Churches to any Monastery or other Religious Houses; save only in such cases where Charity might prevail in derogation of Law; and under this Proviso also, That the Bishops should assign a competent proportion of the Parochial Fruits for the Maintenance of the Incumbent, according to the

Coke 5 par.
11, 12, 13. acc.

Coke 5. Par:
10. in *Caw-
drie's Case*.

Coke 1b & 11.
par. in *Pridle
and Napper's
Case*.
Trin. 11. H.
4, 87. vouch-
ed in *Davie's
Reports*, as
per *Hugh's A.*
bridg. verb.
Appropriat.
Vid. 22 E. 3.
13 Coke 5.
par. vouch-
ed in *Cawdrie's
Case*.
Pasch. 19 El.
C. B. Plowd.
Comment.
496, 497 &c.
Grendon's Case.

annual value thereof, in case the new Appropriators did it not within Six months next after such Appropriation; but this Constitution not taking the effect expected, a convenient Maintenance for the Vicar was otherwise provided for by Two Statutes, the one made by R. 2. the other by his Successor H. 4. So that upon the whole it may be rationally infer'd, that these Appropriations originally came, partly by the Act of Ecclesiasticks, and partly by the Laity. But what way soever they came, this is and hath been held for Law within this Realm, That albeit the Pope takes upon him to be Supream Ordinary, yet no Appropriations made by him, or by any Authority derived from him, were ever allowed or approved of by the Laws of this Realm, it being held, That no Appropriations within this Realm can be made but by the King, or by Authority derived from him, and by his License, and that all other Appropriations are void in Law. An *Appropriation* may be by the King Sole where he is Patron, but it may not be by the Patron Sole; *Grendon's Case* in *Plowden*. & 17 E. 3. 39. An *Appropriation* cannot be without the King's License. *Ward's Case*, *Popb. Rep.* Nor will the Objection hold against the King, to say, no man can make an Appropriation of any Church, having cure of Souls (the same being a thing meerly Ecclesiastical, and to be made by some Ecclesiastical person) but he only who hath Ecclesiastical Jurisdiction; for such Jurisdiction the King hath, and is such a Spiritual person as may of himself appropriate any Church or Advowson, because in him resides the Ecclesiastical Power and Jurisdiction. And therefore in a Case of *Commendams* it was long since held, That an Appropriation made by the Pope, could not be good without the King's License. The like in a Case of *Avoidance* was vouch'd in *Cawdrie's Case*, That the Entry into a Church by the Authority of the Pope only, was not good, and that he could not appropriate a Church to *Appropriatees*, to hold to their own use. And in *Grendon's Case* it was Resolved by the Justices, That the Ordinary, Patron, and King, ought to be assenting to every *Appropriation*; and that the Authority which the Pope had usurped in this Realm, was by Parliament, 25 H. 8. acknowledged to be in the King, who as Supream Ordinary may appropriate without the Bishop's Assent.

(2.) It seems therefore without any contradiction most evident, That *Appropriation* or *Impropriation*, at the Original thereof was, when the Religious Houses of the *Romish* Church, and the Religious persons, as Abbots, Priors, and the like, had the Advowson of any Parsonage to them and their Successors, obtaining License of their Holy Father the Pope, as also of Kings, and of their Ordinaries, that they and their Successors should from thenceforth be the Par-
sons

sons thereof, that it should thenceforth be a Vicarage, and that a Vicar should serve the Cure. So that at the beginning of this Spiritual Monopoly of Appropriations, they were made only to such Spiritual persons as were qualified to Administer the Sacramental Ordinances, and perform Divine Service. Afterwards the Grant thereof was gradually enlarged, and extended to Deans and Chapters, though Bodies Politick, and as such not capable of performing such Divine Services; yea, and (which was most ridiculous as well as Impious) to Nuns, which were Prioressees to some Nunneries, but not Female-Preachers, as in these daies. All which was under a Pretence of maintaining Hospitality; and to supply all defects hereby occasioned, there must be the Invention of a Vicar, as the Appropriators Deputy, to serve them and the Cure, for which he had and hath the Tithe of *Mint* and *Cummin*, and such other small offals of Tithes, as might be spared out of the weightier Granaries thereof without breach of the Laws of Hospitality, thereby Sacrilegiously robbing the Church to enrich themselves. Thus the poor Vicar shall have something like a certain portion of the Benefice, whilst the Abbot and the Covent, and their Lay-Successors shall be the Parsons, and receive the main profits, and so live by the Altar without waiting on it, and be Re-baptized by the Law with the name of *Parsons Imparsonees*. This was that Anciently, which we now call Appropriations, which cannot be made to begin in the Parson's Life-time without his Assent; and is so called, because they hold the profits *ad proprium suum usum*; but if such Advowsons happen to be recovered by Antient Title, then and in such case the Appropriation of the Parsonage is annulled (a).

(3.) So that from the Premises it is evident, That this Appropriation or Impropration is an Annexation of an Ecclesiastical Benefice (which originally was as it were *in nullius Patrimonio*) to the proper and peculiar use and Benefit of some Religious House, Bishoprick, Dean and Chapter, Colledge, &c. *Quod divini juris est, id nullius est in bonis. Instit. de Rev. Divis. §. Nullius*. And it is supposed, That such as are Improprators are so denominated, for that now and hereby they are as Owners of a Fee-simple by reason of the perpetuity of their Title, whence called *Proprietarii*, whereas the Parsons of any Ecclesiastical Benefice are properly, regularly, & ordinarily accounted but *Usufructuarii*, nor were they any other Originally, and not *Domini* as having any Right of Fee-simple in them (b). It is further asserted by Dr. Cowel (c), That before the Reign of R. 1. it seemed to be lawful to appropriate all the *Provenues* of an Ecclesiastical Benefice to an Abby or Priory; provided they found one to serve the Cure; but then withal, the King, though he did not suppress such Spiritual Monopolies, yet made a Law whereby he Ordained,

(a) Terms of Law, verb. Appropriation.

(b) Littl. tit. Discontinuance.

(c) Cowel's verb. Approp.

(d) 15 R. 2.
cap. 6.

(e) Plowd. in
Grendon's Case
fo. 496. &c.
(f) F. N. B. 35.
& Co. l. 7
fo. 13.

(g) Co. 11. 10.
Plow. 496.

That in every Licence of Appropriations to be thenceforth granted in Chancery, it should expressly be appointed and contained, That the Diocesan of the Place should take care to provide an Annual competency or convenient sum of Mony, to be yearly issuing and paid out of the Parsonage-Fruits of that Parish towards the maintenance of the Poor thereof, and for a sufficient subsistence and endowment of the Vicar (d). By the Statute of 15 R. 2. pl. 6. and 4 H. 4. cap. 12. it is Provided, That where a Church is Appropriated, a Vicar ought to be Endowed. If the Church be full, the consent of the Diocesan, Patron, and Incumbent are necessary to an Appropriation, after the Kings License first had and obtained in *Chancery*: But if the Church be void, then the Diocesan and the Patron, upon such License from the King, may conclude it (e). And as to the Dissolution of an Appropriation, the Patron's Presentation of his Clerk to the Ordinary, with his Institution and Induction thereupon, is sufficient to effect it, and puts the Benefice in *Statu quo* (f).

(4.) Although *Appropriations* at their Original were tolerated only to persons Ecclesiastical, and that in order to their better Hospitality, yet now they are become as Lay-Inheritances, and adapted as well to persons Secular as Ecclesiastical, and to Bodies Corporate as well as to persons Private or Individual, who by virtue of their Right and Title to a Parsonage or Spiritual Benefice may take the Profits thereof to their own proper use, maintaining only a Vicar upon the Place to serve the Cure. Anciently and Originally these Appropriations came from the Pope, afterwards tolerated by Kings, & with the consent and approbation of the Ordinary: So that now Appropriators and Appropriations are no other than Lay-Parsons and Lay-Parsonages; which Lay-Parsons as they are the Proprietaries, the Common Law allows them to be called the *Incumbents*, and him that hath the Church by Appropriation, *Parson Imparsoned*; and although they are said to be perpetually Appropriate (g), yet may be dissolved and become *Propriate* again, as in case a Corporation to which it belonged, should be Dissolved; or in case the Advowson should be Recovered by a Title more Legal and more Ancient than that of the Appropriation; which as it was originally tolerated only to Spiritual persons, so never without the Ordinary's Consent and approbation; consonant whereunto are the Seventh and Eighth *Canons* of the Council held at *Gangra*, where a Curse is pronounced upon all such as shall presume to give or receive the Church-Fruits, otherwise than by the Bishops Dispensation, or of such other as by the Bishop shall be appointed thereunto. Nor was it ever in the Primitive times held lawful for meer Lay-men and Secular persons to have any thing to do with the Church

Church Revenues; It was an Observation of Stephen Bishop of Rome, in the second Century in his second Epistle, *Laicis quoque, quamvis Religiosi sint, nulla tamen de Ecclesiasticis Facultatibus disponendi legitur unquam tributa facultas*; which long after was also repeated in the Council of Lateran under Innocent the Third, c. 44. And in the filling of such vacant Appropriations as were granted to Religious Houses, the Bishop was impower'd by Law to oblige the Proprietaries to set out for the Vicar Incumbent such a convenient Portion, as the Bishop in his Judgment should be pleas'd to allot. *Vid. Alex. 3. ad Episc. Wigorn. De Prab. & Dig. c. de Monach.*

(5.) Whereas it hath been formerly hinted, §. 5. that Appropriations have heretofore been granted to *Nunneries*, *Hobart* Chief Justice is express against it, That a Benefice with Cure could not be Appropriated to a Nunnery, though the Pope made many *de facto*, Citing *Dyer* in *Grindon's Case*, saying, that it was a thing Abominable, both against the Law of God *(b)*, and the Law of *(b)* 1 Cor. 14. this Realm; for *Beneficium non datur Nisi propter Officiu*. Nor is *34.* it a sufficient Answer to say, the Cure might be served by a Curate 1 Tim. 2. 1. 1. 1. for them; for the question is not, How they might make a Curate, but how themselves were capable; for it must radically vest in the first Grantee, before it can go in title of Procuration or Deputation to any other: For the proper and operative words which make an Appropriation, are such as must make the Patron and his Successors perpetual Parsons; yet if a meer Lay-man, or one wholly illiterate be Presented, Instituted, and Inducted, this is not a meer Nullity, but he is a Parson *de facto*, as having all the Ceremonies to make him such, and his Insufficiency must receive Examination, yet no dispensation can make him a Lawful Parson, nor subject to Deprivation, because it is *Malum in se*; but in the other Case the Incapacity appears in it self *(i)*. Nor are Appropriations regularly *(i)* Mich. 10. grantable over, neither can they endure longer than the Bodies Jac. rot. 2642. whereunto they were first Appropriate, because it carries not only C. B. Cole and the Glebe and Tithes (which may be granted away) but it doth Glover vers. also give them the Spiritual Function, and doth make the Parsons Bishop of Cox. of the Church, and doth Supply (so *Hobart* Chief Justice) Institution and Induction, which being the Highest parts of Trusts, cannot be estranged: And therefore the Instrument of Appropriation runs in these words, *viz.* That they and their Successors (not their Assigns) shall be Parsons, or by *Periphrasis*, hold the Church *W. Wright.* in proper use *(k)*. Likewise when an Appropriation was made vers. Gilbert by the King as the Supreme Ordinary, or by a Bishop as the Ordinary under him, the Instrument thereof did run in these or the like *Gerrard and Hildersham, Hob Rep.*

like words, *viz.* (if by the King) *Auctoritate nostra Regali*, (if by the Bishop with the King's Assent) that it was *Auctoritate nostra Ordinaria, Ecclesiam Parochialem de B. tali, &c. Annellimus, Appropriamus, & Unimus per Praesentes.*

(l) Trin. 37.
Eliz. in *Cam.*
Seacc. Crimes
and *Smith's*
Case.
Co. 12. par. 4.

(6.) Appropriations of Ancient time are not now in these daies to be questioned as to the Original of them, if they have ever been so reputed and taken for Improvements (l). To which purpose it was resolved in the time of Queen Elizabeth in Chancery by *Egerton* Lord Chancellor of England, being assisted with the Principal Judges, That although Adverson doth not pass by the Grant of the King in strictness of Law, by the words *cum pertinentiis*; yet it shall be intended in respect of the Ancient and continued possession, that there was a lawful Grant of the King to *H. B. &c.* and all shall be presumed to be done, which might make the Ancient Appropriation good: And the Reason thereof there given is, for that if the Appropriation had been drawn in question in the Life-time of any of the Parties to it, they might have shewed the truth of the matter: But after so many Successions of Ages, in which the Church was esteemed to be rightfully Appropriated, the Appropriation shall not now be drawn in question (m). For the same reason a *Præcedens* was refused to be granted in Chancery in the Case of the Lord St. John of Blesso, and the Dean and Chapter of Gloucester, the Court then giving for Reason, because the Defendant and those from whom he claimed, time out of mind had had the possession of a Parsonage as Improper (saving for some short time;) and because it shall be a dangerous Precedent for Owners of Improvements, to maintain the Appropriations to be perfect in all points, and circumstances requisite to an Absolute Appropriation, the Appropriations being made of Ancient time (n). The Like Resolution was given by the Court in *Hunston* and *Cockett's* Case, *viz.* That whether an Appropriation be good or not, cannot now be called in to question, but shall be intended to be good, and to all requisite Circumstances (o).

(m) Hill. 4.
Jac. in Chan-
cery, *Pridle*,
and *Beard*,
& *Wingfield's*
Case.

(n) Trin. 29.
Eliz. in Chan-
cery. Lord
St. John and
the Dean and
Chapter of
Gloucester's
Case. Vid. Co.
2. 10.

12. par. 3. sec. (o) Mich. 8. Jac. B. R. *Hunston* and *Cockett's* Case Cro. 2. par.

(7.) An Appropriation cannot in any case be made by the Patron himself only; yet where the King is Patron, it may be made by him Sole. And although upon every Appropriation there ought to be an Endowment of a Vicar, yet a Vicarage itself Endowed may (as hath been held by the whole Court) be Appropriated, but not to the Parson, (and as in the Book 21 H. 6.) is such.

such a Vicarage, as may afterwards be dissolved (p). And if a (p) Trin. 16. Lease be made of a Parsonage Improprate by one, who hath not Jac. B. B. any thing therein during the life of the Incumbent, it will be void; Ward's Cafe. nor can an Impropration be made to a Church which is Full of Poph. 144, 145. an Incumbent, but by Special words. (q) It hath also been held, (q) Mich. 8. That a Vicarage Perpetual could not be dissolved after the Sta- Eliz. Dyer. 244. B. of Cov. tute of 4 H. 4. and that the Pope had not any power to make any & Lichf. Cafe. Ordinance against that Statute, by which he hath not any right Vid. ibid. Job- to meddle with Advowsons, Benefices, &c. and that by his Bulls son & Michael's Cafe. Adjudg. he cannot dispenſe with the Law, though they tend in ordine ad in Chanc. acc. Spiritualia (r). Vid. Co. 11.

par. 48, in *Lampire's* Cafe. Vid. 19 Eliz. Plow. Com. 500. The Opinion of *Manwood* in *Grendon's* Cafe. acc. Hugh Abridg. verb. Appropriations. (r) Mich. 16 Jac. B. R. *Britton & Wade's* Cafe. Cro. 2. par. 516, 517, 518.

(8.) Touching *Appropriations* there were Three considerable points in Law, Resolved by the Justices in *Grendon's* Cafe:

(1.) That none is capable of Appropriation but a Body Corporate or Politick Spiritual, which hath a Succession: For that the effect of an Appropriation as to the first Institution thereof, was to make the Body Politick perpetual Incumbent, and to have the Rectory, and that he hath the Cure of all the Souls of the Parishioners: and therefore he must be a Spiritual person. (2) That the King, Ordinary, and Patron ought to be assenting unto every Appropriation; and that the Authority which the Pope had usurped in this Realm, was by Parliament, An. 25 H. 8. acknowledged to be in the King; and the King being Supream Ordinary, might of his own Authority and Jurisdiction make an Appropriation without the Assent of the Bishop. (3) That an Appropriation may be made by Apt words, when the Church is Full (as to say) That the Parson who is a Spiritual person, after that the Church shall be void; shall be Parson, and may retain the Glebe, and the Fruits of the Church to his proper use; and that the same shall be a good Appropriation, when the Church shall be void by death or otherwife (s).

(9.) It is brought by way of Report to us, That it was the Opinion of the Master of the *Rolls* in the great Cafe of Consultation, which was argued in the Exchequer Chamber, the 18 H. 6. 21. a. That an Advowson could not be Appropriate without a Succession, although that the Incumbent purchased the Advowson by License to hold to his own use. Where it was further said, That if a Prior were seized of an Advowson to him and his Heirs, and he purchase License of Appropriation, and that he and his Successors might

might hold the Advowson to their own use; yet the Advowson shall descend to his Heirs: But in such case, if he would have the Appropriation to be good, it were best to alien the Advowson, and after to re-purchase it to him and his Successors; and then the Appropriation will be good. (t) All Appropriations have been usually to Corporations or persons Spiritual, and not to Bodies Politick, consisting of meer Lay-men, or Lay-Corporations. And in *Alden and Toshil's* Case it was in question, Whether the King, since the Statute of 25 H. 8. might by his Letters Patents appropriate a Church Parochial, which was before Presentative, unto a Lay-Corporation, all the Members of the Corporation being meer Lay-men: which Case was not then Resolved. (u)

(10.) As a Church Parochial might be Appropriated: so a Church which is Appropriated to a Spiritual Corporation, may become disappropriate, if the Corporation be dissolved. (x) Also if the Advowson of a Church were by License granted to a Prior and his Successors, and afterwards the same Church were Appropriated to him and his Successors: so as thereby they became perpetual Parsons Imparsones; In that Case if the Wife of a Grantor were endowed of the Advowson, and Presented a Clerk who was Admitted, Instituted, and Inducted, the Appropriation would be defeated for ever; for the whole Estate of the Parson Imparsonnee is thereby avoided: And so it was Adjudged, 2 E. 3. 8. *sed Quere*. For in the Case of *Lancaster* and *Lucas*, (y) it was held by the Court, that in such Case the Church was Disappropriated but during the life of the Wife: and after her death it should remain as Appropriated (z).

(11.) Sir H. Hobart Chief Justice, in the Case of *Colt* and *Glover* against the Bishop of *Coventry* and *Lichfield* (a) says, That the proper and operative word that doth appropriate, is to make the Patron and his Successors perpetual Parsons; and in the Case of *Wright* against *Gilbert Gerrard* and *Richard Hilderham*, (b) That the Instrument of Appropriation runs in these words, That they and their Successors (not their Assigns) shall be Parsons, or by Periphrasis, hold the Church in proper use; and the words of Appropriating are, that they may hold *Ecclesiam & Rectoriam in propriis usus*, as in *Grindon's* Case; and says further, that Appropriations cannot endure longer than the Bodies whereunto they were first appropriate, because it carries not only the Glebe and Tithes, but doth also give the Spiritual Function, makes the Parsons of the Church, and supplies Institution and Induction.

(12.) A Prior was seized of the Advowson of a Parsonage, the Church being void, the Bishop gave him License to hold it to his proper use, and there was not any Endowment of the Vicarage.

The

(t) Hugh A-
bridgms. verb.

Appropriate.

2. 1. p. 202.

1. 1. 2. *Gruith*.

on *Tythes* 196.

from *1000*

Calth. 119.

Jelet. 109.

(u) Trin. 9 Car.

B. R. in *Alden*

and *Toshil's*

Case.

Hugh. ibid.

(x) Vid. 3. E.

7. 4. Finch.

Comment. 14.

acc.

(y) Pasch. 33.

Eliz. B. R.

(z) 33 Eliz. in

B. R. Leon. 235.

(a) Mich. 10.

Jac. rot. 2642.

(b) Hill. 15.

Jac. Rot. 1510.

The Jury found the Statute of 4 H. 4. of Appropriations: and of 27 H. 8. which gives Priories, &c. to the King: whether the Appropriation were good, there being no Endowment of the Vicarage: And, whether the Appropriation without the King's Licence was good, was the Question. Resolved, That whether the Appropriation be good or not, cannot now be called in question; but it shall be intended to be good, and have all requisite Circumstances: But in this Case, because the Defendant claimeth *per Præsentationem Regis ratione Lapsus*; Whereas the King, if he had any Title to Present, (c) Mich. 8. it was *Jure Corona*, the Presentment of the Plaintiff was utterly Jac. B. R. Hun- void, and the Plaintiff had no Title, who brought an Action upon *Non & Cocker's* the Statute of 2 E. 6. for not setting forth of Tithes (c). Case.

C H A P. XXI.

Of Commendams.

1. *What a Commendam is : or the Legal description thereof.*
2. *The King may dispence with the holding of divers Benefices in Commendam, notwithstanding the Canon of the Lateran Council against Pluralities.*
3. *Three degrees of Commendams by the Canon Law.*
4. *A description of a Semeſtral and Temporary Commendatory.*
5. *The provision the Pope made in granting Commendams ; certain Benefices in the Church of Rome never given in Commendams.*
6. *What the Canon in Commendams ad Tempus or Perpetuo.*
7. *The grand Case of a Commendam at the Common Law, between Kiffin and Alcouggh, and therein great variety of Learning touching that Subject.*
8. *Several Considerations in Law touching Commendams.*
9. *An Irish Case with great variety of Learning, in reference to this Subject.*

1. **C**ommendam (*Ecclesia Commendata*) is a Benefice or Ecclesiastical Living, which being void, is *commended* to the charge and care of some sufficient Clerk, to be supplied until it may be conveniently provided of a Pastor : And this was the Original of what we now commonly call *Commendams*. *Durand. de Benefic. lib. 5. cap. 7.* That person to whom the Church is thus *Commended*, hath the Fruits and Profits thereof only for a certain time ; whereby the nature of the Church is not charged, but is as a thing deposited in his hands as it were in Trust, being concredited only with the care and custody thereof, which may be revoked. Thus when a Parson of the Parish is made the Bishop of a Diocese, there is a *Cession* of his Benefice by the Promotion ; but if the King gives him power to retain his Benefice, he shall continue Parson thereof, and shall be said to hold it in *Commendam*. (*a*) So that it may properly be thus defined, *Commendam est Ecclesiæ Custodia alicui Commissa in tempus, gratia evidentis necessitatis*

(a) Hob. Rep.
fo. 144.
Latch. Rep.
fo. 236, 237.

cessitatis & utilitatis. Gloss. in verb. *Commendare, c. nemo deinceps, de Elect. in lib. 6. & Andr. in dict. Gloss.* For hereby the Bishop commits the care and custody of a vacant Church to some one, whom he Constitutes as a general Administrator thereof. *Corras. de Sacerd. mater. p. 1. c. 6. nu. 3. & dist. c. Nemo* for *Commendare* in this sense is no other than *Deponere*. *l. Publius, ff. Deposit. & l. Commendare ff. de verb. Sign.* And he to whom the same is so committed is in the Law termed *Commendatorius* having the custody of a Vacant Church and the Fruits thereof only for a time; and the *Beneficium Commendatum* we call *Commendam*. *Petrus Gregorius* make this *Commendam* of a Church to be on a double account, viz. either in *utilitatem Ecclesie* or *Commendatorii*; In the former case, he says, the *Commenda* gives no Title to the *Commendatory* of the Benefice, but is only a Custody or Trust which may be revoked, and consequently repugnant to the nature of a Benefice, which is Perpetual: In the other Case, the Benefice is held to be a *Commenda* made in *utilitatem Commendatorii*, which he may hold and possess as long as he lives. *Petr. Greg. de Benef. c. 10. n. 13.*

(2.) By a Canon of the Lateran Council no person Ecclesiastical could hold Two Benefices with Cure of Souls *simul & semel*, but by the taking of a Second the former would be void. *Conc. Later. & F.N.B. 3 S. L. & Co. Par. 4. 75. & Lindw. Consil. Provin. de Prab. cap. Audistis*; yet might the King it seems by the Common Law, notwithstanding that Canon, grant Dispensations to hold divers Benefices in *Commendam*; as at this day he may notwithstanding the Stat. of 21 H. 8. For the Statute of 25 H. 8. that takes away the Popes usurped power of granting *Commendams*, &c. in this Realm, doth vest it in the Crown *de jure*, as also doth the Statute of 1 Eliz. and (from and under the Crown) in the Archbishop of Canterbury, his Commissaries, &c. And as heretofore the Pope did by usurpation in this Realm, so now *de jure & ex Regali Autoritate*, may the King grant unto a Consecrated Bishop a Dispensation *Recipere & obtinere Beneficium cum Cura animarum*, and to hold the same in *Commendam*. (b)

(b) Co. par. 4.
75. Holland's
Case.

(3.) In the Case of *Colt* and *Glover* against the Bishop of *Coventry* and *Lichfield*; according to Sir Hen. Hubart Lord Chief Justice, out of the Canons, *Commendams* are said to be of Thre Degrees, or, *Semestris*, another *Perpetua vel ad vitam*, a third *Intermedia* or *Diuturna, sed Limitata*; and sometimes called *Temporalia* or *Temporalis, vel ad certum Temporis spatium Limitata.* *Clem. v. extra l. 3. de Ræbendis, c. 2.* The *Commenda Semestris* did arise out of natural Equity, that in the time of the Patrons respite given him to Present, the Church should not be without a Provisional Pastor, which was a Law of Necessity agreeable to the Law of Nature.

But

But after the Lapse justly incurred, the *Commendatus* is to cease, or then the Ordinary may Collate. The *Commenda Perpetua vel ad vitam* is that which cannot be for a less time than for the life of the *Commendatary* absolute. And the *Commenda Intermedia; diuturna*, or *Temporalis vel ad certum tempus factum Limitata*, is when a *Commenda* is to a person not for his life absolutely, but so long as he shall be Bishop of such a place, or the like. Each of which Degrees of *Commendams* doth refer to the *Commendam obtinere, capere, & apprehendere*. A Dispensation *Commendam recipere*, which shall make a Title, ought to have three Incidents; (1) It ought to be *Recipere & condicere in usus proprios*. (2) It ought to be *ad utilitatem Ecclesie, vel Personarum*. (3) It ought to have the Assent of the Patron. And he that is but mere *Commendatarius* is accountable to the Ordinary, *Vide Case Evans and Ascough, in Latch. Rep.* And not to the *Commendam retinere*, which in truth is no *Commendam*, though commonly so called; but is only a faculty of Retention and Continuation of the Benefice in the same person and state wherein it was, notwithstanding something intervening, as a Bishoprick or the like, which without such a Faculty would have avoided it,

(4) The *Semestrial Commendatory* is not reputed *Praelatus*, but *Procurator & Administrator, habens titulum Canonici*; It doth make *Fructus suos*, but *ad providendum sibi & Ministris*; and what remains, is to be converted to the use of the Church. *Greg. X. in Concil. Lugd. An. 1275. Gloss. in cap. Nemo. 15. De Electione in Saxo.* And John d' Arbon, upon Orbozon's Canon or Constitution *De Commenda Ecclesiarum*, says, That *Commendare idem est quod Deponere, seu Custodie Committere*: And all agree that such a *Commendatory* is not *Praelatus*, but *Procurator*; *babet tamen Legitimam Administrationem ad Colligend. & providend. Ministris; ea vero quae supersunt, ad utilitatem Ecclesie convertenda.* *Commendare (ut ait Papin) nihil aliud est quam deponere, l. Lucius, ff. Deposit. & l. Commendare, ff. de verb. Sig. & l. Publica, ff. Deposit. & Gloss. ibid.* But as to a *Perpetual Commendam*, *Perpetuity*, and the disposal of the Fruits must concur. (c) And as a Patron cannot Present to a Church Full, so neither can a *Commendam* be made to a Church certain that is then Full; for there is no difference betwixt a *Commendam* and a *Presentation*, but that the one presents the Parson to the Church, the other commits the Church to the Parson, both being incompatible when the Church hath its proper Rector; The Canons also speaking of *Commendams*, rely much upon *Ecclesias vacantes, necessitatem & utilitatem Ecclesie vacantes*. And *Commendams* were not made anciently in general terms, to any Churches uncertain, but to some certain Church then void. Also the

An. 1248.

(c) Gomez. in Regul. de Tri-en poss.

the Patrons consent is necessary to a *Commendam*, *secundum omnes Patroni consensus, & omnium qui sedes possunt, requiruntur*; And again, *Quod satis observant Praelati, qui nisi Praesentati per Patronos, non faciunt Commendas*. Gloss. in Concil. Ludg. & Othob. Freuinc. Hob. Rep. in dict. Cas. Colt and Glover, vers. Bishop of Covent. & Lichfield. Likewise it is further asserted by Sir H. Hobart, in the Case aforesaid, That the Temporary *Commenda* brings with it so many Incongruities, Inconveniences, and Absurdities in Law, as cannot be born; for thereby the Church is neither altogether void as it remains in the Case of a *Commendam Semestris*, which is but a Sequestration of Fruits and Cure till the Patron Presents; neither is the Church absolutely Full, for then it should be *Plena & Consuetudo*, h. e. *plena de possessore, & consuetudo de rectore* (d).

(d) Hob. ibid
supra.

(5.) *Commenda* in the Canon Law hath a high affinity to *Collation*. Rebuff. in §. *Statuimus in ver. conferantur. de Collat.* and is a Canonical Institution, or a Canonical Title: *cap. Dudum, in 2. de Elect.* *Et si in titulum non detur Ecclesia*, and when the *Commendatory* dies the Benefice is void, *ut alia in titulum Possess.* Rebuff. de pacif. Possess. nu. 42, 43, 44. The Pope was wont to provide by a *Commendam*, when he gave a Benefice in *Custodiam*, that he that had the Custody thereof, should not thereof have *fructus suos*: *cap. Nemo, de Elect. in 6.* but should restore the same: *Can. placuit 10. q. 3.* unless he express'd in the Grant (as he often did) that the *Commendatory* should convert the Fruits thereof to his own use. It is in Law provided by the *Commendam*, that the *Commendatory* shall not be, nor said to be *Titularius Ecclesiae concessa*, because he hath another at the same time, and together with that he cannot *aliam habere in titulum*: *cap. dudum, in 2. de Elect. cap. fin. 21. q. 1.* For the Law compares the relation that is between a Rector and his Church to that of Man and Wife, and in express terms calls it *Matrimonium*; *cap. sicut vir. q. 1.* and says, it is as odious to have more Benefices than one at once, as more Wives than one at once; *cap. de multa de Praebend.* whence it may aptly be inferred, That Plurality is a kind of spiritual Bigamy or Polygamy. Moreover, by the Canon Law a *Commendam* may be either for a certain time, or for life: *cap. Extirpanda §. quia vero. De Praebend. &c. nemo de Electo. in 6.* And during the vacancy of a See the Chapter may grant the *Commendam ad tempus*: *c. significatum de Praeb. & dict. c. nemo*. If the *Commendam* be granted in Perpetuity or for life, it is *vice tituli*: *Nam ad tempus Collatio fieri nequit Beneficii: c. significatio. de Rescript. & c. satis peruersum. 66. Dist.* In the Church of Rome there are certain Benefices which never went to be given in *Commendam*, such as that of the Holy Ghost in Sicily, St. John

of

of Jerusalem, St. Anthony, the Blessed Virgin Mary, and others; and this by a Constitution of Pope Alexander the Sixth, as a mark of grace; because they were given to the Fraternity of these Orders in *titulum Rebuff. de Commendis. nu. 41. Prox. Benif.*

(6.) Whether any man inferior to a Bishop, may *Ecclesiam Commendare*, is a Question moved by *Rebuffus*, who holds it in the affirmative; provided it be a *Commenda* only *ad Tempus*; that is, only for Six months; *Rebuff. Respon. 71. de Commenda*. Which opinion *Panormitan* seems to be of, by saying, *Inferiorem a Papa non posse Perpetuo Commendare, sed ad Tempus: sic Panorm. in c. si constitutus. in 1. notab. de Accusat.* For the Canonists of the Romish Church do hold, That *Commendare in perpetuum potest solus Papa, Ad tempus sex mensium quilibet Ordinarius potest*: Likewise *Panormitan* says further, That a Chapter (*Sede vacante*) *possit usque ad sex menses Commendare*: *Panor. & Felin. in. c. cum olim 11. q. de Major. & obed. & Jo. Francisc. in Tract. de Offic. & potest. Capituli Sede vacante. in 2. part. q. 3.* whence *Rebuffus* concludes that any other *qui Beneficium conferre potest* may do the like; it being as a Rule in Law, That *illud videtur permissum, quod non est prohibitum: c. nam concupiscentiam. de Consti. & L. precipimus C. de Appellat.* The Canon Law, to which only we are beholding for the clearest apprehensions we can possibly have of *Commendam*, allows a very extensive Latitude to the Pope in the granting and revoking thereof; but this doth not concern us further than as the Popes Ecclesiastical power, heretofore exercised in this Realm by way of Usurpation, is now vested in the King *de jure*; yet it will be agreed on all hands, that a *Commendam* in the very nature of it, is merely and properly Custodial, that Church or Benefice being then granted in *Commendam*, *quando in custodiam, seu Custodie causa datur: c. nemo. de Elect. in 6.* And as he who hath only the Custody of a thing, *non facit fructus suos*: so neither he (according to the Canon Law) who hath a *Commendam*, without the Popes special grant thereof to the Commendatory: *c. placuit, 10. q. 3. Rebuff. de Commenda*, who yet by the same Law *possit expensas facere ex redditibus Beneficii Commendati, sumere ex eo alimenta, & debita persolvere, sicut is qui titulum habet: c. 1. de Solutio. hoc asserit Archidiaconus. in cap. qui plures. 21. q. 1.*

(7.) The grand Case of a *Commendam* was that of *Evans* and *Kiffin* against *Alewigh*; which being two dales argued by the Judges, and by Noy Attorney, is acutely and succinctly Reported thus, *viz.* In Trespass: Dr. *Thornbury* being Dean of York was chosen Bishop of *Limrick* in Ireland: but before Consecration or Confirmation, he obtained a Patent with large words, *Non obstante retinere valeat*

in *Commendam* the said Deanry, &c. And afterwards he was chosen Bishop of *Bristol*; and then also before Installation he obtained another Patent, with a more ample Dispensation of retaining the Deanry in *Commendam*. It was agreed by all, That the Church or Deanry, &c. in *England* shall be void by Cession, if the Parson, or Dean, &c. be made a Bishop in *Ireland*. For the Canon Law in that is one through all the World. Also *Ireland* is governed by the Laws of *England*, and is now as part of *England* by Subordinacy. Note well 45 E. 3. 19. b. Confirmation under the Great Seal of *England* is good in this case; Confirmation under the Great Seal of *England* of a Presentation to a Church in *Ireland*, of the Heir of the Tenant of the King; and that a Dispensation under the Great Seal of *England* is good in this case, without any Patent of it in *Ireland*, vid. 8. Aff. 27. 10 E. 3. 43. An Exchange of Land in *England* for Land in *Ireland* is good. Note 20 H. 6. 8. Scir. fac. sued in *England* to Repeal a Patent under the Great Seal of *Ireland*, viz. the Irish Statute 2 Eliz. cap. 4. That an Irish Bishop may be made under the Great Seal of *England*. Note, Stat. 1 E. 6. the Irish Bishops shall be Donative by Patent of the King under the Great Seal of *England*; yet the King may let them be chosen *per Conged' Esire, &c.* (1) Noy Attorney argued at Bar, and so stated the Points of the said Case by themselves: If a Commendatory Dean by a *Retinere in Commendam* may well Confirm a Lease made by the Bishop; for it is Agreed, That a Commendatory Dean by *Recipere in Commend.* cannot Confirm, because he is but a *Depositarius*. Note 19 H. 6. 16. 12 H. 4. 20. 27 H. 8. 15. a Commendatory shall be sued by that Name, and by such a *Commend.* he may take the profits, and use Jurisdiction, and yet is not a Dean compleat. Note, he may make a Deputy for Visitation, but not for Confirmation of Leases. Note, if there be two Deans in one Church, both ought to Confirm. Vid. Dy. 282. Co. Inst. 20. a. (2) The Second point, if such a Bishop be chosen to another Bishoprick, if now the first Church in *Commend.* (admitting that there was a Full Incumbent) be void presently by the Election and assent of the Superiour (viz.) the King: And it seemed to him that it was, because there need not be a new Consecration; and he vouched *Panorm. 2 par. 101.* The Bishop of *Spires* was chosen Bishop of *Treves*, and had the assent of the Pope, and he came to *Treves*, and there found another in possession; and he would have returned to the former Bishoprick, and could not. He also Cited 8 Rep. *Trollop's Case*, That the Guardianship of the Temporalities cease by the Election of a new Bishop. Note, that Serjeant *Hendeu*, who argued on the contrary, vouched *Micb. 4. fac. May, Bishop*

Hill. 22. Jac.
B.R. rot. 1169.
Evans & Kiffin
against Afcough
Noy's Rep.

shop of *Carlisle* made a Lease to the Queen, and a Commission issued out of the Exchequer to take it, and the Dean and Chapter Confirmed it before the Inrolment of it; and yet Adjudged good: That Case was for the Castle of *Horne*. First, the Judges having argued two days, Resolved, (1) That all *Commendams* are Dispensations, and that Cession commenced by the Canon and Council of *Lateran*. (2) That the King may dispence with that Canon, 11 H. 7. 12. For the Pope might, and now by the Statute 21 H. 8. that power is given to the King *cumulative*, by way of Exposition *veteris*, and not by Introduction *novi Juris*; and by that Statute a concurrent power is given to the Archbishop of *Canterbury*, and may be granted to the King, or by the Archbishop, &c. (3) That the Dispensation after Election to the first Bishoprick and before Consecration, &c. and also the Dispensation after Election to the second Bishoprick, and before Confirmation, is good enough in both Cases, and he remains a good Dean to Confirm, &c. and afterwards the Judgment in the Case, being an Action of Trespass, was given accordingly.

Hill. 14. Jac.
in the Exchequer,
Colt vers.
Glover.
Roll. Rep.

Hill. 39 Eliz.
B. R. Armiger
and Holland's
Case.
Cro. par. 1.

(8.) A *Commendam* is to be granted *Necessitate evidenti, vel utilitate Ecclesie suadente*, and in the Infancy of the Church, *quando defuerunt Pastores*, they were necessary: A *Commendam* ordinarily is but for six months, and he that hath it is *Custos* only, the other is extraordinary, and that is for life, and he is an Incumbent. The King by his Prerogative Royal may grant a *Commendam* without any Statute; yet if such *Commendam* shall be good, it may be very mischievous to the Patron. It is it seems agreed in the Books of the Common Law, that the use of *Commendams* in their first Institution was lawful, but not the abuse thereof; and that a perpetual *Commendam*, viz. for life, was held unlawful, and condemned by a Council of 700 Bishops. It is likewise Reported to us, That where the Incumbent of a Church was created a Bishop, and the Queen granted him to hold the Benefice which he had in *Commendam*: It was the Opinion of the Justices, That the Queen had the Prerogative by the Common Law, and that it is not taken away by the Stat. of 35 H. 8.

Pasch. 9 Jac.
C.B. in Ireland
between the
King and Cypr.
Horsefal, & Rob.
Wale.
Davis Rep.

(9.) In a *Quare Impedit* brought by the King against *Cyprian Horsefal* and *Robert Wale*, on a Special plea pleaded by *Wale* the Incumbent, the Kings Attorney demurred in Law: The Case in substance, was this, viz. the Corporation of *Kilkenny*, being Patrons of a Vicarage within the Diocess of *Osory*, Presented one *Patrick Fynne* thereunto, who was Admitted, Instituted, and Inducted. After that, during the Incumbency of the said *Fynne*, *Adam Loftus* Archbishop of *Dublin*, and *Ambrose Forth* Doctor of the Civil Law,

Law, being Commissioners Delegates for granting of Faculties, and Dispensations in the Realm of Ireland, according to the Stat. of 28 H. 8. c. 16. by their Letters Dated 9 Oct. 33 Eliz. granted to John Horsfal, then Bishop of Ossory, That the said Bishop *unum vel plura Beneficia, curata vel non curata, sui vel alieni Juris patronatus, non excedentia annum valorem quadraginta Librarum, ad tunc vacantia vel quæ per imposuerum vacare contigerint, perpetuæ Commendæ titulo adipisci, occupare, retinere, omnesque fructus ad Familia suæ sustentationem convertere possit, jurebus sive institutis quibuscunque in contrarium non obstantibus.* Which Faculty or Dispensation was after ratified and confirmed by Letters Patents under the Great Seal of Ireland, according to the Statute of 28 H. 8. c. 16 After this, viz. 20 May, An. 38 Eliz. Patrick Fynne the Incumbent died, whereby the said Vicarage being void, and so continuing void by the space of Six months, whereby the Bishop had power to Collate thereunto by Lapse, the said Bishop by virtue of the said Faculty or Dispensation *adeptus est, occupavit, & retinuit* the said Vicarage *perpetuæ Commendæ titulo*, and took the Fruits thereof to his own use, until the 13 Feb. An. 1609. on which day the Bishop died: After whose death the said Cyprian Horsfal, having purchased the next Avoidance of that Vicarage, Presented the said *Wale*, who was Admitted, Instituted, and Inducted: afterwards the King Presents one *Winch*, who being disturbed by the said *Horsfal* and *Wale*, the King brought a *Quare Impedit*. Whether the said Bishop, when he obtained and occupied that Vicarage by virtue of that Faculty or Dispensation, were thereby made compleat Incumbent thereof, so as the Church being full of him, no title by Lapse could devolve to the King during the life of the Bishop, was the principal point moved and debated in this Case. And in the Argument of this point (which was argued at the Bar first by the Councel at Common Law, and then by two Advocates well versed in the Cannon Law, and at the Bench by all the Justices) Two things were chiefly considered by those who argued for the Kings Clerk: (1) Whether the Bishop could by any Law have and hold that Benefice without such Dispensation or Faculty. (2) What effect or operation that Faculty or Dispensation shall have by the Law. As to the First, they held clearly for Law, That a Bishop by the ancient Ecclesiastical Law of England, may not hold another Benefice with Cure in his own Diocels: and if he hath such Benefice before his promotion to the Bishoprick, that it becomes void when he is created a Bishop. And this is the Ancient Law of Engl. as is often said in the Bishop of St. David's Case, 11 H. 4. & 41 E. 3. 5. b. agrees therewith. The Reason is, for that the Bishop cannot visit himself, and he that

hath the Office of a Sovereign, shall not hold the Office of a Subject at the same time; as *Hankford* said in the said Case of 11 H. 4. And on this Reason it is said in 5 E. 3. 9. That if a Parson be made a Dean, the Parsonage becomes void, for that the Dignity and the Benefice are not compatible: So no Ecclesiastical person, by the ancient Canons and Councils, could have Two Benefices with Cure *simul & semel*, but the first would be void by taking a second. And this was the Ancient Law of the Church used in England long before the Statute of 21 H. 8. cap. 13. which was made in Affirmance of the Ancient Law, as appears in *Holland's* Case. Co. par. 4. And with this agrees the Books of 24 Edw. 3. 33-39 Ed. 3. 44. a. & N. Br. 34. l. And the Text of the Canon Law, which is the proper Fountain of this Learning, proves it fully; *Decretal. de Præbend. & Dignit. c. de multa*: Where it is said, *De multa providentia fuit in Lateranenſi Concilio prohibitum, ut nullus diverſus Dignitates Eccleſiaſticas, vel plures Eccleſias Parochiales reciperet, contra Sanctorum Canonum inſtituta, &c. Præſenti Decreto ſtatuiſimus, ut quicumque reciperit aliquod Beneficium, curam habens animarum annexam, ſi prius tale Beneficium habebat, eo ſit ipſo jure privatus, & ſi forte illud retinere contenderit, etiam alio ſpolietur, &c.* And with this agrees the Text in *Decret. Cauſ. 21. q. 1. viz. In duabus Eccleſiis Clericus conſcribi nullo modo poteſt.* So that it is evident, that the Biſhop could not by any Law have or retain that Benefice within his Dioceſis without a Diſpenſation, which is *Relaxatio Juris*, and permits that to be done, which the Law had before prohibited. It is to be obſerved, That *Commenda eſt quædam proviſio*, and therefore *Gomez. in Reg. de Idiomate*, ſaith, That *Commendare eſt Providere, & quod Commenda comprehenditur ſub quibuſcunque regulis de Proviſione loquentibus.* And by the Canon Law the Conſent of the Patron is requiſite, where a Benefice is given in *Commendam. Lib. 6. Decretal. c. Nemo.* where the Gloſs ſaith, *Ad Commendam vocabitur Patronus, & ſi qui alii ex tali Commenda læduntur.* Alſo in *Conſtit. Othob. de Commendis* it is ſaid Exprefly, That *Conſenſus Patroni ad Commendam requiritur.* The Canon Law holds theſe *Commendams* as very præjudicial, and that in divers reſpects; and therefore ſays, That *Experientia docet, occaſione Commendarum cultum Divinum minui, Curam animarum negligi, hoſpitalitatem conſuetam & debitam non ſervari, ruinis ædificia ſupponi, &c. 6. Extra. cap. Paſtoris.* And whereas it is ſaid of a Biſhop, That he is to be *unius uxoris vir*; the Canoniſts expound it, That he ſhall have but one Biſhoprick, or only one Cure; for they ſay, that *per Commendam Bigamia contrahitur in Eccleſia*: Therefore it was well Reſolved by that good and

and pious Bishop, who (when another Benefice was offered him to hold in Commendam) said, *Abstine ut cum Sponsa habeam Concubinam*. But for the clearer understanding of the nature and difference of these Commendams, it is further to be considered, That *Commenda Ecclesiæ* is nothing else but *Commendatio Ecclesiæ ad Custodiam alterius*; and therefore *Decret. caus. 21. q. 1. Qui plures*, the Gloss there saith, *Commendare nihil aliud est quam deponere*. This *Commenda* or *Commendatio Ecclesiæ* is divers, according to the nature of the Church, and Limitation or Continuance of the *Commenda*: for a *Commenda* may be of a Church either *Curatæ* or *non Curatæ*; and it may be either *Temporanea*, viz. for a time certain, as for Six months; or *Perpetua*, viz. during the life of the *Commendatory*. A Church with Cure may not be given in *Commendam*, unless upon evident necessity, or the benefit of the Church, viz. to supply the Cure till provision be made of a sufficient Incumbent: And therefore by the Council of *Lions* it was provided, That a Parochial Church should not be given in *Commendam*, nisi ex evidenti necessitate, vel utilitate Ecclesiæ; & quod talis *Commenda* ultra semestris temporis spatium non duraret: & quod secus factum fuerit, sit irritum ipso jure, &c. 6. *Decretal. c. Nemo*. But a Benefice without Cure may be given by the Canon Law for the subsistence of the *Commendatory*, vel ad mensam: In that sense the Canonists say, That *Commendam* is quasi comedenda, quia Ecclesiæ quæ traditur in *Commendam* quasi comeditur & devoratur, and such a Benefice may properly be given in perpetuam *Commendam*. *Summa summar. tit. Commenda, art. 1. & 2.* And by the Rule of the Canon Law, he that comes in per *Commendam*, is not *Pralatus*, sed *Procurator tantum*, & est nisi *Custos*, seu *Administrator*, & jus in Ecclesiâ non habet. 6. *Decretal. c. Nemo*. & *Constit. Othobon. de Commendis, fo. 65.* And therewith agrees 27 *H. 8. 15.* where it is said, That the Cardinal of *York* had the Abbey of *St. Albans* in *Commendam*, and yet was not the Abbot. In this Case of a *Commendam* in *Davis Rep.* the Original or invention of a *Commendam* is ascribed to Pope *Leo 4. An. Dom. 848. aut eo circiter*, as appears *lib. Decretal. caus. 23. q. 2.* where it is said, *Unde Leo 4. scribit, Qui plures Ecclesias retinet, unam quidem Titulatam, alteram vero sub Commendatione tenere debet*: For by the Ancient Canons and Councils a man could have but one Benefice, and yet it is by experience found convenient, that sometimes, viz. in case of Necessity or Utility of the Church, a man may have the Charge and Fruits of more Benefices than one; therefore was that Distinction invented and allowed, that although a man shall have but one Benefice

nefice in *Titulo*, yet he may have other Benefices in *Commenda*, viz. That another Benefice may be commended and committed to his Custody and Cure, until it be provided with an able Incumbent. But afterwards, there being great Abuses found in the granting of these *Commendams* by the Ordinaries (for *omnium rerum quarum est usus, potest esse abusus, virtute solum excepta*, says Aristotle) another Canon was made in the Council of *Lions*, Anno Dom. 1274. for reformation thereof, as appears lib. 6. *Decretal. de Elect. & Elect. potest. c. Nemo*. *Nemo deinceps Parochialem Eccles. alicui non Constituto in legitima ætate vel Sacerdotio Commendare præsumat; nec tali, nisi suam, & evidenti Necessitate vel Utilitate Ecclesiæ suadente. Hujusmodi autem Commendam ritè factam declaramus ultra Semestre temporis spatium non durare, &c.* But the Gloss there saith, That if a *Constitutio non comprehendit Romanum Pontificem, ideo Romanus Pontifex potest Perpetuo Commendare*. So that the Pope, notwithstanding that Canon, had power to give Benefices in *perpetuam Commendam*. And indeed after the said Council of *Lions*, as the Pope had reserved to himself the sole power of giving Benefices in *perpetuam Commendam*, so he reduced that power into act, and used and practised the same in all Realms of Christendom: Specially the Popes that were resident at *Avignon* in *France* in the times of King *E. 2. E. 1. E. 2. E. 3.* were very liberable, not only in granting these *Provisions* (contrary to our Statutes made in the times of King *H. 1. & Ed. 3.*) but in giving all sorts of Ecclesiastical Benefices in *Commendam perpetuam*. And as at first it was done for the support of the Dignity of Cardinals, as Pope *Clement 6.* professed in his Epistle to *Ed. 3. Hist. VValsingham*, fo. 150. b. yet afterwards these Favours were purchased by other Ecclesiastical persons of all degrees, in all Nations, specially in *England* and *Ireland*. And whereas the Canon Law says, That a man hath a Canonical Title by virtue of a *Commendam*, that must be understood *de Commenda Perpetua*, and not *de Commenda Temporalis*; for the *Commenda Temporalis* is but a kind of Sequestration, and may be granted by every Ordinary *pro tempore Semestri*; and therefore such a Commendatory *non est Prælatas, nec Maritus Ecclesiæ, nec facit Fructus suos, sed est Administrator tantum, & Custos Ecclesiæ*. And such a *Commenda non est titulus, nec facit titulum, sed est quoddam depositum*, until the Church be provided with a sufficient Incumbent; and therefore such a *Commenda* is commonly granted when the Patron doth not Present an able person, or when the Church is Litigious. But the *Commenda Perpetua*, which continues during the Life of the Commendatory, cannot be granted by any inferiour Ordinary, but only by the Pope

in ſuch Countries where he hath Jurisdiction, or by the King or his Delegates in this Realm, or ſuch whoſe power therein is derived from him or confirmed by him. And this *Commenda eſt titulus Canonieus; nam militat eadem ratio in perpetuis Commendis, qua in aliis Titulis. Lib. 6. de Eleſt. c. Nemo.* And ſo it hath been often adjudged in *Rota*, as *Gomez* affirms in *Reg. de Trien. Poſſeſſ.* where he argues this point *Pro & Con* at large, and where he ſaith, That the Faculty of a perpetual Commendam is *ampliſſima diſpoſitio, & habet ubertatem verborum, viz. Licentiam & Facultatem Fructus omnes percipiendi, & in proprios uſus Convertendi, &c. Quæ verba important Collationem & Titulum, & non Simplex Depositu.*

CHAP.

C H A P. XXII.

Of Lapse.

1. *What a Lapse is; the gradations, and Original thereof.*
2. *The difference between the Canon and Common Law, as to the time of Lapse; and when the Six month shall begin.*
3. *The King is Patron Paramount of all the Churches in England.*
4. *In what Cases the Patron is to take notice of the Avoidance at his peril, or not; and how the Six months are to be computed by the days.*
5. *A Lapse is not an Interest, but a Trust or Administration, and may not be transferred or granted over.*
6. *How or from what time the Six months shall be computed, before the Lapse incur.*
7. *Whether a Bishop may Collate by Lapse after Six months, upon failure of the Clerks shewing his Letters of Orders, or his Letters Missive or Testimonial?*
8. *In what case Tempus occurrit Regi in point of Lapse.*
9. *In what cases the King having Title of Lapse may lose his Presentment.*

(a) An. 13. E-
Hz. c. 12.

L *Apsus*, or *Lapse*, is a slip or departure of a Right of Presenting to a void Benefice, from the Original Patron neglecting to Present (within Six months next after the Avoidance) to the Ordinary. Whence it is commonly said, That that Benefice is in Lapse or Lapsed, whereunto he that ought to Present, hath omitted or slipped his opportunity (a). This Lapse may happen and be, the Patron being ignorant of the Avoidance, as well as if he were acquainted therewith or privy thereto, except only upon the Resignation of the former Incumbent, or the Deprivation upon any cause comprehended in the Statute of 13 *Eliz. c. 12*. In which cases the Bishop ought to give notice thereof unto the Patron. In this matter of *Lapse* there are Three gradations, *ab Inferiore ad Superiorem*, after the neglect of the true Original Patron, upon whose default (1) the Bishop of the Diocese, within whose precincts the vacant Benefice lies, shall Collate, unless the King be Patron. (2) If the Bishop presents not within the
next

next Six months, then the *Metropolitan* shall Present: And (34)
 if he Present not within the time by Law limited, then the King shall
 Present, for that he is Patron-paramount of all the Benefices with-
 in his Realms; and also because the King and his Progenitors, Kings
 of England, have had Authority time out of mind to determine
 the Right of Patronages in this Realm in their own Courts, whence
 lies no Appeal to any Foreign pretended Power. The *Rafell Sum-*
miſt indeed makes more Gradations in this matter, as from the Pa-
 tron to the Chapter, from the Chapter to the Bishop, from the Bi-
 shop to the Metropolitan, from the Metropolitan to the Patriarch,
 and if none such, then to the Pope. *Sed hoc nihil ad nos*, part of
 whose happiness is an *Index Expurgatorius* of the last recited Pre-
 misses. And although the Law is That the Ordinary shall Pre-
 sent, in case the Patron doth not within Six months; yet the Law
 withal is, That if the Patron Present before the Ordinary put in
 his Clerk, the Patron of right shall enjoy his Presentation (b). (b) Dr & Stud.
 And if the Ordinary surceſs his time limited, he loses his power
 as to that Presentation, specially if it be devolv'd to the King.
 And when the Presentation is in the Metropolitan, he shall put in
 the Clerk himself, and not the Ordinary; and so there is no default
 in the Ordinary, though he Present not the Clerk of the Patron,
 if his time be past, in which case there is no remedy for the Patron
 against the Ordinary (c). This matter of Lapse is of very ancient
 practice, for Mich. 3 E. 1. B. Rot. 105. Staff. The Bishop of Co-
 ventry and Lichfield pleaded a Collation by Lapse *Authoritate Con-*
cilii against the Prior of *Landa* to the Church of *Patingham*. And
 6 E. 1. Rot. Paten. membra 25. in a *Quare non admisit* by the Ab-
 bot of St. Mary Eborum against the Bishop of *Norwich*, the Bishop
 made a Title by Lapse, viz. That he Collated *Authoritate Concilii*
post Lapsum semestre, &c. And there afterwards in the Judgment it
 is said, *Quia tempus semestre Authoritate Concilii non incipit versus*
Patronum nisi a tempore scientia mortis, &c. (Q. what Council is
 here meant or intended) For P. 9 E. 1. B. Rot. 51. it appears that
 Lapse was given per Concilium *Lugdunense post tempus semestre*:
 The like also in a Writ in the time of E. 2. cited by Sir Ed. Co. 6.
 in *Catesby's Case*, 62 (d); yet in *Bracton* the *Lapsus temporis* is de-
 Constitutione *Lateranensi* (e). And ye *Britton*, fo. 225. speaks of verb. Present.
 the *Tempus Semestre* or the Six months according to the Council of
Lions; But Mr. *Selden* in his Book of Tithes, 390. says, That the
 Manuscript of *Breton* hath *Lateran* for *Lions*, and in fol. 388.
 holds, That this Lapse was received in the Law of this Realm out
 of the general Council of *Lateran*, held in the year 25 H. 2. as
 the Learned Serjant *Roll* observes in his Abridgment on this word
 of Lapse, where he also cites *Hovenden*, fo. 326. asserting, That
 among

Dr. & Stud.
 125. Co. par. 4.
 17. & per 5.
 58. Specor's
 Case. Actiō.

(b) Dr & Stud.
 cap. 36.

(c) Dr. & Stu-
 ibid.

(d) Roll Abr.
 speaks of verb. Present.
 lit. O. p. 354.
 (e) Bract. lib.
 4. fol. 241.

among the Canons of the Council of *Lateran* held under *Alexander 3.* An. 1118. in the time of King *Hen. 2.* there is a Canon in these words or to this effect, viz. *Cum vero Præbendæ Ecclesiæ seu quælibet Officia in aliqua Ecclesia vacare contigerit, vel si etiam modo vacant, non diu maneat in suspensio, sed infra Sex menses personis, quæ digne administrare valent, conferantur: si autem Episcopus, ubi ad eum spectaverit, conferre distulit, per Capitulum Ordinetur.* And before the said Council the Patron was not limited to any time, but might Present at his pleasure without any *Lapse* (f). Touching other Presidents of great Antiquity relating to this Subject of *Lapse*, the Reader is here referred to that Learned Serjeant *Rolle*, in the forcited place of his Abridgment. And although according to the Gradations aforesaid, the *Lapse* devolves from the Patron to the Bishop, from the Bishop to the Archbishop, from the Archbishop to the King; yet if after *Lapse* incur to the Metropolitan, and before Collation by him made the Patron Present, he may Present to the Ordinary of the Diocess, without Presenting to the Metropolitan. *Contra H.4.1.El.B.R.per Popbam* (g); for thereby he seems to redeem his neglect. But yet if *Lapse* devolve to the King, and then the Inferiour Ordinary Collate by the *Lapse*, and his Clerk be Instituted and Inducted, it seems this doth not make a Plenarty against the King to put him to his *Quare Impedit*, but he may notwithstanding Present and *oust* the Clerk of the Ordinary; for when *Lapse* incurs to the King, it cannot be taken away by the Ordinary: And then when the Ordinary Collates without good Title, it makes not any Plenarty against him who hath the right as the King hath to Present; for a *Lapse* incurring to the King is not like that which incurs to the Metropolitan (b). But if a Patron Present, and his Clerk be Instituted, and remain Eighteen months without Induction, in that case there doth not any *Lapse* incur to the King; for the King hath not any *Lapse* but where the Ordinary might have had it before (i). But if a Bishop dies, whereby the Temporalities are in the Kings hands, if during that time the Six months pass, whereby a *Lapse* happens, the King shall have it, and not the Guardian of the Spiritualities (k). Nor doth an Admittance of Resignation by Fraud, take away the Kings Title; for in *Comber's* Case against the Bishop of *Cicester*, where the Issue in a *Quare Impedit* was, if S. R. by covin between him and C. and R. did Resign into the hands of the said Bishop, if the King hath Title of *Lapse*, and a Resignation be made by fraud, and one Admitted, this shall not take away the Kings Title; for if the Kings Title appear upon Record, then shall go out a Writ for the King, but otherwise it is upon matter of Evidence, the King doth lose his Presentation as well by resignation

(f) Seld. de
Decimis, 387.
& Braet. lib. 4.
241.

(g) Roll. Abr.
ver. Present.
lit. N.

(b) Rol. ibid.
lit. Q. nu. 21.

(i) Hob. Rcp.
208.

(k) Braet. l. 5.
fo. 404. Sect. 10.

as by death, where he hath Title to Present by Lapse, and doth not, except the Resignation be by Fraud (1). And in the Case of the Queen and the Archbishop of York and Bucks, it was Resolved by the Justices, That a Collation, although double or treble, cannot be an Usurpation against the King to put him out of an Advowson (m).

(2.) The Canon Law allows Two months more to an Ecclesiastical, than to a Lay-Patron; ere the Lapse shall be incur'd, the former having by that Law six months to Present, the latter but Four. *Summ. Angel. tit. Jus Patronat. §. 16.* So the Law of Scotland: *Parf. Counf. par. 1. c. 2.* We need not inquire into the Reason of that difference or disproportion; let it suffice the Laity, That it was the Canonists pleasure to have it so, for reasons best known to their own interest; the Common Law impartially levels them both to one and the same equal standard of Six months. By the Common Law of England, as well Clerks as Laics have Six months to Present before the Lapse incur: *Dr. & Stu. 116. b. Per la. Com. Ley de Scote: Laici Patroni quadrimestre, Ecclesiastici vero Sex mensium sapium habent sibi concessum ad Praesentandum personam idoneam Ecclesiae vacanti. Skene. Regiam Majestatem, 10. b. But Fac. 6. pl. 1. cap. 7. pl. 7. cap. 102. pl. 12. cap. 119, 158. Concedit Patrono Laico sapium Sex mensium, infra quod Praesentare debet.* The Question is not so much, when the Term shall end and determine, as when it shall commence, and from what time the Six months shall be computed. The Answer falls under a double consideration, or is diversified according to the divers manners of Avoidance; for if by Death, Creation, or Cession the Church be void, then the Six months shall be computed from the Death, Creation, or Cession of the last Incumbent, whereof the Patron is to take Notice at his peril: But if the Avoidance be by Resignation or Deprivation, then the Six months shall begin from the time of Notice thereof given by the Bishop to the Patron, who is not obliged to take knowledge thereof from any other, than by signification from the Bishop (n). But in case the Avoidance were caused by an Union (for so it might be) then the Six months should be computed from the time of the Agreement upon that Union; for in that case the Patron was not ignorant of, but privy to the Avoidance; for there could be no Union made, but the Patron must have the Knowledge thereof; and then it was to be appointed who should Present after the Union, as whether one or both, either jointly or by turns one after another, as the Agreement was upon the Union (o).

- (3.) The Continuance of a Voidance of a Church by the several Lapses of Patron, Bishop, and Archbishop, derives the Title of Presentation at law to the King as Patron paramount of all the Churches in England; and wherever the Original Patron by Law ought to take notice of a Voidance at his Peril, there and in such case by a Non-Presentation within Six months from the time of such Voidance the Lapse will ever incur: And generally by the Admission, Institution and Induction to a Second Benefice, *Prima Ecclesia vacat de persona* of the Incumbent, & *vacans continuat* till new Induction (p). But when an Archbishop, Bishop or other Ordinary hath given a Benefice of right devolute unto him by Lapse of time, and after the King Presenteth, and taketh his Suit against the Patron, who possibly will suffer that the King shall recover without Action tried, in deceit of the Ordinary or the possessor of the said Benefice; in such and all other like cases, where the Kings Right is not tried, the Archbishop, Bishop, Ordinary, or Possessor, shall be received to counterplead the Title taken for the King, and to have his Answer, and to shew and defend his Right upon the matter, although that he claim nothing in the Patronage (q): so that the Ordinary may Counterplead the Kings Title for a Benefice fallen to him by Lapse. Also when the King doth make Collation or Presentment to a Benefice in anothers Right, the Title whereupon he groundeth himself, may be well examined, that it be true; which if before Judgment it be by good Information found to be otherwise, the Collation or Presentment thereof made may be Repealed, whereupon the true Patron or Possessor may have as many Writs out of Chancery as shall be needful. There are some (r) Statutes (the King not being bound by Lapse of Time, for *nullum Tempus occurrit Regi*) which are good remedies and reliefs for the Ordinary that hath Collated by Lapse, as also for the Clerk that is Collated; for otherwise a common person might by Practice have turned out a lawful Collatee: to which purpose the Lord Hobart doth instance in a Case; A Common person, no true Patron, Presents within Six months, and the true Patron himself Presents not in time, whereupon the Ordinary Collates by the Lapse, against whom the Pretender brings a *Quant Impedit*, because his Clerk was refused, wherein he must needs prevail, if his Title be good; and it must be taken for good, because neither Ordinary nor Incumbent could deny it; for *de non apparentibus, & de non existentibus eadem est ratio*; which Inconvenience is remedied by the said Stat. of 25 E. 3. c. 7. Note, that Lapse doth not incur to the Ordinary by reason of his not examining the Clerk within 6 months. Trin. 3 Jac. B. R. inter Palmer and Smith. Resolved per Cur.

(p) Mich. 2.
Car. C. B. Rot.
441. The King
and the Bishop
of Canterbury
and Pryst's
Case. Cro.
1. par. 258.

(q) An. 25. Ed.
3. cap. 7.

(r) St. 25. Ed.
3. c. 3.
St. 13 R. 2. 1.
St. 4 H. 5. 21.

(1) If a Plea be depending between Two parties, and it be not discussed and determined within Six months, the Bishop may Present by Lapse, and he that hath the Right to Present, shall according to the Statute recover his Damages (s). But it is expressly provided by the Statute of 13 Eliz. 12. That no Title to Collate or Present by a Lapse shall accrue upon any Deprivation *ipso facto*, but after Six months after Notice of such Deprivation given by the Ordinary to the Patron (t). But if the Church become void by Death, Creation, or Cession of the last Incumbent, the Patron is at his peril to take Notice of such Avoidances within the next Six months thereof (u). But if it become void by Deprivation or Resignation, the Clerk is not obliged to tender his Presentation to the Bishop, nor the Patron obliged to Present his Clerk, but within Six months next after Notice legally given him by the Ordinary of the Avoidance by such Deprivation or Resignation (x); which Six months are to be calculated or computed by 182. days, and not by 28 days to the Month (y). Nor is there any Addition of time over and above the 6 months allowed the Patron to Present from the Vacancy a Second Clerk, in case the former were legally refused by the Bishop (z). Yet the Ordinary may not take advantage of the Lapse in case in the Patron Presents his Clerk, before the other hath Collated (a); though it be otherwise with the *Canonists*: *Lind. c. Si aliquo evincente, &c. verb. Injuria*. But if the Bishop Collate, and the Patron Present before Induction, in that case it seems he comes too late (b). And at the Common Law Sir *Simon Degge* in his *Parsons Counsellor* makes it a doubtful Question, if the Church Lapse to the King, and the Patron Presents before the King take advantage of the Lapse, whether this shall avoid the Kings title by Lapse? This (says he) is a Question by *Dyer* (c), though *Hobart* seems to be clear in it, that the King shall not have the benefit of the Lapse (d); but adds that divers Authorities are against them (e). And in the case aforesaid, wherein Notice of Avoidance ought to be given to the Patron before the Lapse can incurr, the Patron is not obliged to take Notice thereof from any person other than the Bishop himself, or other Ordinary (f), which also must be given to the Patron personally, if he live in the same County; and if in another County, then Publication thereof in the Parish-Church, and affixed on the Church-Door, will serve turn, If such Notice doth express in certain (as it ought to do) the cause of the Deprivation, &c. (g): As upon Deprivation of an Incumbent for not reading the 39 Articles of Religion, the Ordinary is to give the Patron notice thereof, which notice ought to be certain and particular (h). Before Lapse can incurr against a Patron, notice

(s) West. 2.
cap. 5. Term.
Law, verb.
Quare Imp.
(t) Dyer, fo.
346, 369. 377.
Co. li. 6. fo. 29.

(u) 22 H. 6.
29. b.
(x) Dr. & St.
l. 2. c. 31.
Roll. 2. 364.
&c.

(y) Yel. 100.
& Co. 6. 61. b.
62. a.
(z) Kelw. 50.
b. & 14 H. 7.
21. a.

Dyer. 227. p. 7.
(a). 13 E. 4.
3. b. & 11 H.
4. 80. a. &c.
Hutton. 24.
(b) *Dyer* 270.
p. 56.

(c) Dy. 277.
p. 55.
(d) Hob. 152.
Hut. 24.
(e) Cro. Eliz.
119. Cro. Jac.
216. a.

Owen 3, & 7.
Roll. 2. 368. b.
27. E. 3. 84. b.
Co. 7. 28.
Dr. & Stud.
lib. 2. cap. 31.

Parf. Counfel.
par. 1. cap. 2.
(f) Dr. & Stud.
ubi supra.
(g) Co. 6. 19. b.
& Cro. Eliz. 119.
Dyer. 328. a.

(h) 18 Eliz. *Dyer* 346. Trin. 41. El. B. R. *Baker and Brent's Case*. Co. par. 3. acc. 679.

of

of his Clerks being refused by the Ordinary for Insufficiency, must be given to the person of the Patron, if he may be found, and it is not in that Case sufficient to fix an Intimation thereof on the Door of that Church to which he was presented. *D. 16. El. 327.7.b. Ad. judged.*

(5.) It is said, That a Lapse is not an Interest naturally, as is the Patronage, but a meer Trust in Law. And if the Six months be incurred, yet the Patrons Clerk shall be received, if he be Presented before the Church be Filled by the *Lapse* (i). Observe 7 *E. Dyer* 241. for it seems by that case, that the Patron should Present against the Kings Lapse, for he hath dammage but for half a year. And *Hob.* Chief Justice says, That a Lapse is an act and office of Trust reposed by Law, in the Ordinary, Metropolitan, and lastly in the King; the end of which Trust is to provide the Church of a Rector, in default of the Patron; and yet as for him, and to his behoof. And therefore as he cannot transfer his Trust to another, so cannot he divert the thing wherewith he is entrusted to any other purpose. Nor can a *Lapse* be granted over, as a Grant of the next Lapse of such a Church, neither before it fall, nor after. If the Lapse incur, and then the Ordinary die, the King shall Present, and not the Executors of the Ordinary: For it is rather an Administration than an Interest; and the King cannot have a Lapse, but where the Ordinary might have had it before (k). If an Infant-Patron Present not within Six months, the Lapse incurs. The Law is the same as against a Feme-Covert, that hath right to Present. 35 *E. 3. Qu. Impedit* 46.

(6.) In the first Paragraph of this Chapter it is said, That *Tempus Semestre auctoritate Concilii non incipit versus Patronos nisi a tempore Scientie mortis personæ*, that is, of the last Incumbent (p). And so Adjudged upon a Writ in the time of *E. 2.* (q), and said to be *per Legem & Consuetudinem Regni hactenus usitatas*. As if the Incumbent die beyond Sea, the Six months are not computed from the time of his death, but from the time of the Patrons knowledge thereof; and so it was Adjudged in a *Quare non admisit* between the Abbot of *St. Mary Eborum* and the Bishop of *Norwich*, as aforesaid (r). For the Six months are not reckoned from the death of the Last Incumbent, but from the time the Patron might (according to a reasonable Computation, having regard to the distance of the place where he was at the time of the Incumbents death, if he were within the Realm at that time) have come to the knowledge thereof; for he ought afterwards to take notice thereof at his peril, and not before, for that he was in some other County, than that wherein the Church is, and wherein the Incumbent died (s). And if the Ordinary refuse a Clerk for that he is *Criminous*,

in

(i) 13. E. 4. 3.
Brook Ple-
nary, 15.

43 E. 3. 11.

11 H. 4. 80.

(k) Mich. 10.
Jac. Rot. 2642.
Colt and Glo-
ver vers. the
Bishop of Co-
ventry and
Lichfield.
Hob. Rep.

(p) 6 E. 1. Rot
Pat. membr.
25.

(q) Co. 6.
Catesby 62.

(r) Di. 6. E. 1.

(s) 5 E. 1. 75.
Adjudge Q.
Elcanors case.
contra Co. 6.
Catesby, 62. b.

in that case the Patron shall not have Six months to Present after Notice thereof given him, but of the Avoidance (r). The Law (s) 14 H. 7. 11. is the same in case of Refusal by reason of *Illiterature*, (u): But Curia. 18. H. 7. if the Church be void by Resignation or Deprivation, the Six Kell. 50. b. months shall be computed from the time of notice thereof given Quare. (u) D. 15, 16. to the Patron, and not from the time of the Avoidance (x): Yet El. 227. 7. per if the Ordinary refuse a Clerk because he is *Criminous*, he is to Curiam. give notice thereof to the Patron, otherwise the Lapse doth not (x) 1 H. 7. 9. b. incur (y). So likewise, if he be refused for Common Usury, Si- D. 15, 16. El. mony, Adultery, or other Notorious Crime, Notice thereof ought 327. 7. to be given to the Patron, otherwise the Lapse doth not incur (z); Dr. & Stu. 16; 5 E. 4. 3. b. A Lay Patron ought to have Notice ere the Lapse shall Incur, in (y) 38 E. 3. 2. case his Clerk be refused for *Illiterature*: otherwise as to a *Spiritual* (z) 18 H. 7. Patron, because the Law presumes, he might well know of his Kell. 50. b. insufficiency before he presented him (a). And if the Bishop who Contr. per. took a Resignation dies, the Lapse doth not incur to his Successor Fromick. (a) 18 H. 7. without notice to the Patron (b). Kell. 49. b.

(7.) In a *Quare Impedit* the Defendant pleaded, That he demanded of J. S. the Presentee of the Plaintiff to see his Letters of Orders, and he would not shew them, and also demanded of him his Letters Missive or Testimonial testifying his ability; and because he had not his Letters of Orders, nor Letters Missive, nor made any proof of them to the Bishop; he desired leave of the Bishop to bring them, who gave him a week; and he went away and came not again, and the Six months passed, and the Bishop Collated by Lapse: It was Adjudged in this Case, That these were no Causes to stay the Admittance of the Clerk, for the Clerk is not bound (understand it *only at Common Law*) to shew his Letters of Orders and Letters Missive to the Bishop, but the Bishop must try him upon Examination (c).

(8) A Parson of the Church of S. of the value of Ten pound, took a Second Benefice without a Dispensation, and was Instituted and Inducted, and continued so for twelve years: The Patron presented J. S. who was Instituted and Inducted, and so continued divers years, and died. The Queen presented the Defendant *C. ratione Lapsus* in the time of A. who was Instituted and Inducted. B. the Patron brought a *Quare Impedit* against the Ordinary and C. It was held by the Justices, That the Writ did well lie; and that *tempus occurrit Regine* in this Case, and that last Clerk should be removed. Mich. 27. & And it was held by the Justices, That upon a Recovery in a *Qua.* 28. Eliz. C. B. *Impedit*, any Incumbent that comes in *pendente Lite* should be re- Beverly and Cornwal's Case. moved.

(9.) In

(9.) In the Case between *Cumber* and the Bishop of *Chichester*, it was Resolved (1) If Title of *Lapse* accrues to the King, and the Patron Presents, yet the King may Present at any time as long as the Presentee is Parson; but if he dies, or Resigns before the King presents, he hath lost his presentment (2). If the King hath Title by *Lapse*, because a Parson hath taken a Second Benefice, if the Parson dies, or Resigns his First Benefice, and the Patron presents, whose presentee Resigns upon Covin and dies, the King hath lost that presentment (e).

(e) Hill.
Jac. B. R.
Cro. par. 2.

C H A P. XXIII.

Of Collation, Presentation, and Nomination.

1. *What Collation is, and how it differs from Presentation.*
2. *Collation gains not the Patronage from the Crown.*
3. *The Ordinary's Collation by Lapse is only in the Patron's Right.*
4. *What Presentation is, and how in case of Co-heirs, or Joynt-tenants, or Tenants in Common.*
5. *Whether the Grantee of the next Presentation, not Presenting at the First Avoidance, shall lose the benefit of his Grant?*
6. *The Right of Presentation is not an Ecclesiastical, but Temporal Inheritance, and cognizable at the Common Law.*
7. *The power of the Ordinary in case of Coparceners, Joynt-tenants, or Tenants in Common, as to Presentation.*
8. *In what Case the Bishop hath Election, whose Clerk he will Admit.*
9. *Whether a Presentation is revocable before Institution?*
10. *Whether the Son may succeed his Father in the Church? and who may vary from, or repeal his Presentation.*
11. *What Nomination is, and the qualification thereof.*
12. *In what Case the Presentation is the Nomination, or both as one in Law.*
13. *In what case the Nominator shall have a Quare Impedit, as well as he that hath Right of Presentation; And there may be a Corrupt Nomination, as well as a Corrupt Presentation.*
14. *Whether the Collatee be Incumbent, if the Bishop Collate him within the Six months? And in what Case the Kings Presentation within the Six months may be an Usurpation, or not.*
15. *Where the Ordinary Collates, the Patron is to take notice of it at his peril.*
16. *Who shall Present in case the Ordinary, to whom a Lapse is devolved, be within the Six months translated to another Bishoprick.*
17. *A Resignation to a Proctor, without the Bishops Acceptance, makes not the Church void.*

18. *A Parochial Church may be Donative, exempt from the Ordinary's Jurisdiction, and is Resignable to, and Vistable by the Patron, not the Ordinary.*
19. *Where Two are to Present by Turns; what Presentation shall serve for a Turn, or not.*
20. *By the Canons the Son may not succeed the Father in the same Church.*
21. *To what a Presentation may be made.*
22. *The Kings right of Presentation as Supream Patron.*
23. *In what case the Kings Prerogative to Present doth not take place.*
24. *In what Cases it doth.*
25. *To whom the Patronage of an Archbishop belongs.*
26. *Whether Alien Ministers are Presentable to a Church in England.*
27. *In what Case the Patron may Present de novo.*
28. *Difference between the King and a Common person in point of Presentation.*
29. *A Collation makes no plenarty where it is tortious.*
30. *Presentation may be per parol as well as by Writing.*
31. *What amounts to a Revocation of the King's Presentation.*
32. *Causes of Refusal of the Clerk Presented.*
33. *Certain Law-Cases pertinent to this Subject.*
34. *Whether Institution granted after a Caveat entered, be void?*
35. *What shall be held a Serving of a Turn, and good Plenarty and Incumbency, against a Patron in Severalty.*
36. *A Clerk refused by reason of his not being able to speak the Welsh Language.*
37. *What is the best Legal Policy upon every Presentation by Usurpation.*
38. *One of Two Grantees of an Advowson, to whom the other hath released, may Present alone, and have a Qua. Imp. in his own Name.*
39. *A Clerk refused for Insufficiency by the Bishop, may not afterwards be Accepted.*

(I.) **C**ollation in its proper signification, is the bestowing of a Benefice by a Bishop that hath it in his own proper right, gift, or Patronage; distinguish'd from *Institution* only in this, That *Institution* into a Benefice is at the instance, motion or Presentation of the Patron, or some other having *pro tempore* the Patrons Right, performed by the Bishop. *Ext. de. Instit. & de Concess. Præben. &c.* But *Collation* is, not only when the person is Admitted to the Church or Benefice by the Bishop or other person Ecclesiastical,

cal; but also when the Bishop or that other Ecclesiastical person is the rightful Patron thereof; or when the Bishop or Ordinary hath right to present for Lapse of the Patron; and yet sometimes Collation is and hath been used for Presentation. (a) And so Presentation, Nomination and Collation, are commonly taken for one and the same thing in substance, though at times distinguished: (b) And whereas it hath been a Question, If one hath the Nomination, and another the Presentation, which of them shall be said to be the very Patron; it hath always been taken to be the better opinion, that he who hath the Nomination, is Patron of the Church. And where an Abbot had the Presentation, and another the Nomination, & the Abbey surrendered to the King, he that hath the Nomination shall now have all; for the King shall not Present for him, that being a thing undecent for the King. (c) But as to Collation and Presentation, they were in substance one and the same thing, as aforesaid: (d) But to speak properly, Collation is where the Bishop himself doth freely give a Benefice, which is of his own Gift by right of Patronage or Lapse. (e) This word [Collation] seems also to be frequently used when the King Presents; and hence it is that there is a Writ called Collatione facta uni post mortem alterius, &c.] directed to the Justices of the Common Pleas, Commanding them to direct their writ to a Bishop, for the Admitting one Clerk in the place of another Presented by the King, which Clerk (during the Suit between the King and the Bishops Clerk) is departed this Life: For Judgment once given for the Kings Clerk, and he dying before his Admission, the King may bestow his Presentation on another. (f) This Collation, Presentation, and Nomination, are in effect Synonyma, being distinguished only in respect rather of Persons, than of Things.

(2.) Yet there may be a great difference betwixt Presentation & Collation, which gains not the Patronage from the King, as appears in the Case of the Queen against the Bishop of York, where the Queen brought a Quare Impedit against the said Bishop, and one Monk, and counted upon a Presentment made by King H. 8. in the right of his Duchy of Lancaster, and so conveyed the same to the Queen by Descent: The Bishop pleaded; That he and his Predecessors have Collated to the said Church, &c. & Monk pleaded the same Plea, upon which there was a Demurrer. And it was moved by Beaumont Serjeant, that the Plea is not good, for a Collation cannot gain any Patronage, & cannot be an Usurpation against a Common person, much less against the Queen, to whom no Lapses shall be ascribed; & although the Queen is seized of this Advowson in the right of her Duchy, yet when the Church becomes void, the right to present vests in the Royal person of the Q. & yet vid. the Old Regist. 31. Quando Rex presentat non in jure coronæ, tunc incurrit ei Tempus. Ham.

Serj. By these *Collations* the Queen shall be put out of possession, & put to her Writ of Right of Advowson, but the same ought to be intended, not where the Bishop *Collates* as Ordinary, but where he *Collates* as Patron, claiming the Patronage to himself, for such a *Collation* doth amount to a *Presentation*; and here are two or three *Collations* pleaded, which should put the Queen out of possession, although she shall not be bound by the first during the life of the first Incumbent. *Vid. Br. Quare Impedit*, 31. upon the abridging of the Case of 47 E. 3. 4. That two Presentments the one after the other, shall put the King out of possession, and put him to his Writ of Right of Advowson, which *Anderson* denied. And it was holden by the whole Court, here is not any *Presentation* and then no possession gained by the *Collation*: and although the Bishop doth *Collate* as Patron, and not as Ordinary, yet it is but a *Collation*. And there is a great difference betwixt *Collation* and *Presentation*; for *Collation* is a giving of the Church to the Parson, but *Presentation* is a giving or offering of the Parson to the Church, and that makes a *Plenary*, but not a *Collation* (g).

(g) Pasch. 33.
Eliz. C. B.
the Queen and
the Bishop of
York's Case.
Leon. Rep.

(3.) The *Collation* of the Ordinary for Lapse is in Right of the Patron, and will serve him for a Possession in a *Darrein Presentment*, as appears by *Colt* and *Glover's* Case against the B. of *Conventry* and *Lichfield* where it is said, That the Ordinary, or he that presents by Lapse, is a kind of Attorney made by Law, to do that for the Patron, which it is supposed he would do himself, if there were not some let; and therefore the *Collation* by Lapse is in right of the Patron, and for his turn, 24 E. 3. 26. And he shall lay it as his possession for an Assize of *Darrein Presentment*, 5 H 7. 43. (b). It seems also by *Gawdy's* Case against the Archbishop of *Canterbury* and others, That although a Bishop *Collates* wrongfully, yet this makes such a *Plenary* as shall bar the Lapse of the Metropolitan and the King. (i) And this *Collation* by Lapse is an act and office of Trust reposed by Law in the Ordinary, Metropolitan and King; the Title of Lapse being rather an *Administration* than an *Interest*, as in *Colt's* Case aforesaid; which Title of *Collating* by Lapse may be prevented by bringing a *Quare Impedit* against the Bishop: Also where and in what Cases the bringing of that Writ against the Bishop shall or shall not prevent such *Collation*, appears in the Case of *Brickhead* against the Archbishop of *York*, as Reported by Sir *Hen. Hobart* Chief Justice (k).

(b) Mich. 10.
Jac. Rot. 2642.
Colt and Glover.
vers. Bish. of
Conventry and Lichf.
Hob. Rep.
(i) Hill. 17.
Jac. rot. 1840.
Case Gawdy
vers. Archb.
of Cant & al.
Hob. Rep.

(k) Mich. 15.
Jac. Brickhead
vers. Archb. of
York.
Hob. Rep.

(4.) *Presentation* is the Nomination of a Clerk to the Ordinary to be Admitted and Instituted by him to a Benefice void, and the same being in Writing, is nothing but a Letter Missive to the Bishop or Ordinary, to exhibit to him a Clerk to have the Benefice voided, the Formal force hereof resteth in these words, *viz. Prasento vobis*.

vobis Clericum meum. Thus Presentation properly so called, is the act of a Patron offering his Clerk to the Bishop, to be instituted in a Benefice of his Gift. (l) It is where a man hath a Right to give any Benefice Spiritual, and presents the person to the Bishop, to whom he gives it, and makes an Instrument in writing to the Bishop in his favour; and in case there be divers Coheirs, and they not according in the Presentation, that which is made by the eldest of the Coheirs, shall be first Admitted; but if it be by Joyntenants, or Tenants in Common, and they accord not within 6 months, the Bishop shall present by Lapse. (m) By the Statute of 13 Eliz. cap. 12. a Presentation of an Infant to a Benefice is void. And although a Presentation, being but the Commendation of a fit person by the Patron to the Bishop or Ordinary to be Admitted and Instituted into a Benefice, may be done either by word alone, or by a Letter or other writing, yet the Grant of a next Avoidance is not good without Deed. (n) But a Presentation, being no other than a Commendation of a Clerk to the Ordinary (as aforesaid) and only a thing concerning an Advowson, without passing any interest of the Inheritance of the Advowson, may be done by word only; upon which ground it was resolved by the whole Court, That the Kings Presentation unto an Advowson appendant to a Mannor parcel of his Duchy, under the Great Seal of England, without the Seal of the Duchy, was well made, and good: (o) Yea, and for the same Reason for that a Presentation is but a Commendation, and toucheth not the Inheritance, was the Kings Presentation to the Deanry of Norwich held good, albeit in the said Presentation he mistook and misrecited the Name of the Foundation of the Deanry (p).

(l) *The Form whereof vid. Reg. Orig. fo. 322. a.*

(m) *Terms of Law, verb. Presentment.*

(n) *Mich. 31. & 32 Eliz. C. B. Cripps & the Archb. of Canterbury's Case.*

(o) *Owen 47. 11 Jac. C. B. The King and the Bishop of Linc. Case.*

(p) *Also Mich. 8 Jac. C. B. Case betwixt the King and the Bishop of*

Chichester, then vouched and affirmed for Law. (p) Stephen Gardiner's Case there vouched by Cook, Chief Justice. Vid. Mich. 3 Car. B. R. Stephens and Porter's Case. Cro. 4. par. 70, 71. acc. Vid. Trin. 8 Jac. C. B. rot. 1811. Cro. 2. par. 247. the same Case.

(5.) A. seized of an Advowson in Fee, Grants *Presentationem* to B. *quandocunque & quomodocunque Ecclesia vacare contigerit, pro unica vice tantum*; in the Grant there was further this Clause, *viz. Insuper voluit & concessit*, That the Grant should remain in force *quousque Clericus habilis & idoneus* shall by his Presentation be Admitted, Instituted, and Inducted. Afterwards A. grants away the Advowson in Fee unto S. The Church becomes void. S. Presents, The Church becomes void again. S. Presents G. upon a disturbance of M. the Presentee of B. the First Grantee, a *Quare Imp.* is brought. The Question was, Whether B. the First Grantee, not Presenting upon the First Avoidance, had lost the benefit of his Grant? In this Case it was Adjudged by the whole Court, That although A. the Grantor grants *Donationem & Presentationem*,
quam

quandocunque Ecclesia vacare contigerit, pro unica vice tantum, yet B. ought to have taken the first Presentation that hapned, and hath not Election to take any turn other than the First, when the Church first becomes void; and by his neglect in not Presenting then, hath lost the benefit of his Grant; and the subsequent words in the Grant are but only an Explanation of the words precedent, and relate to the next Avoidance (q).

(q) Tr. 8 Jac.
B. R. Starkey
and Pole's
Case. Bullstr. 1.
par. 26. 2.
Hughes Abr.
ver. Advow-
son, Sect. 6.
§. 13.

(6.) The Right of *Presentation* is a Temporal thing, and a Temporal Inheritance, and therefore belongeth to the Kings Temporal Laws to determine, as also to make Laws who shall Present after Six months as well as before; so as the Title of Examination of *Ability* or *Non-ability* be not thereby taken from the Ordinary. The Law is the same touching Avoidances, for it shall be judged by the Kings Temporal Laws, when and where the Church may be said to be void or not; the Cognizance whereof doth not belong to the Kings Ecclesiastical Laws; and therefore where a Parson is made a Bishop, or accepts another Benefice without License, or Resigneth, or be Deprived: In these cases the Common Law would hold the Church void, albeit there were any Ecclesiastical Law to the contrary: (r) And it is sufficient for the Ordinary's discharge, if the Presentee be able, by whomsoever he be Presented; which Authority is acknowledged on all sides to have been ever inherent in the Ecclesiastical Jurisdiction: But as to the Right of *Presentation* it self, to determine who ought to Present, and who not, and at what time, and when the Church shall be Judged to become void, and when not, all these appertain to the Kings Temporal Laws. And in case it happen that the King Present not, where of Right he may, in such case the Ordinary may *pro tempore* depute a fit person to serve the Cure; as in like case he may, where there is a default or neglect in other Patrons to Present, and do not (s).

(r) Dr. & Stu.
cap. 36.

(s) Dr. & Stu.
ibid.

(7.) If the Patrons be Joynt-tenants, or Tenants in Common of the Patronage, and they vary or differ in their Presentations, the Ordinary is not in that Case bound to Admit either of their Clerks, nor him that is Presented by the Major part: And if the Six months expire ere they agree, the Ordinary may Present by the Lapse; but within the Six months he may not; for if so, and the Patrons accord, they may bring a *Quare Impedit* against him as a Disturber, and remove his Clerk. But in case the Patrons have the Patronage by Descent as Coparceners, then is the Ordinary obliged to Admit the Clerk of the Eldest Sister, who hath the precedency by Law in the *Presentation*, if she so please; after which and at the next Avoidance the next Sister shall Present, and so in order by turn one Sister after another till all the Sisters or theirs Heirs have Presented, and then the Eldest Sister shall Present again, and this is called a Presenting

senting by *Turn*, which holdeth always between Coparceners of an Advowson, unless they agree to Present together, or in some other manner by way of Composition, which if so, then the Agreement ought to hold good. Yet here note, That if after the death of the Common Ancestor, the Church happen to be void, the Eldest Sister together with another of the Sisters, presents, and the other Sisters severally and each in her own Name, or jointly and altogether; In this case the Ordinary is not obliged to receive any of their Clerks, but may suffer the Church to run into the Lapse; for there is no obligation on the Ordinary to admit the Clerk of the Eldest Sister, but where she presents in her own Name only. And in such case of variance or difference among the Patrons touching the *Presentation*, the Church is not properly said *Litigious*, obliging the Ordinary at his peril to direct a Writ to enquire *de Jure Patronatus*, which Writ lieth only where two or more Present under pretence of several Titles: But in this case all the Patrons present under one and the same Title; for which reason the Ordinary may, if he please, suffer it to pass into the Lapse (r).

(r) Dr. & Stu.
cap. 30.

(8.) Suppose a Patron presents to a Church void, and before the Admission of the Clerk the Patron dies; after his Executors (before such Admission) Present another Clerk, Q. Whether the Archdeacon ought to receive the Clerk of the Testator, or of the Executors? The Opinion of the whole Court was, That the Bishop should have Election therein. (u) And in case an Agreement be made by way of Composition between divers claiming one Advowson, and Enrolled, or by Fine, that one shall successively after another Present in such an order certain; and after one hath presented, he to whom at the next Avoidance the Second *Presentation* doth belong, is disturbed by any that was party to the said Fine, or by some other in his stead: In such case it is provided, That such so disturbed shall not be put to the *Quare Impedit*, but their resort to the Roll or Fine shall be sufficient, where if the Concord or Agreement be found, the Sheriff shall be commanded, That he give knowledge to the Disturber, that he shew by such a time certain (as fifteen days, or three weeks) if he can alledge any thing, wherefore the party that is disturbed, ought not to present; and if he appear not, or appearing alledge nothing sufficient in Bar, he shall recover his *Presentation* with Damages (x).

(u) Trin. 13.
Eliz. C. B.
Smallwood
vers. Bishop
of Lichfield
Leon. Rep.

(x) Stat. 13.
Ed. 1. cap. 5.

(9.) In the Case of *Evans* and *Ascough* it was the Opinion of *Doderidge*; That a Bishop hath no more in a Church by *Election* than a Parson hath by *Presentation*. And that if a man Present to a Church, yet any time before Institution he may revoke it, and Present another; and if in that case the Bishop will Institute the First, a *Quare Impedit* will lie against him. (y) But if the Patron Present one, and he be Admitted by the Ordinary, he cannot in that case vary from his *Presentation*: as was also held by *Doderidge* in *Stoke's Case* against *Styles*; (z) where he further said, That it was out of all question at the Common Law, that before Admission by the Ordinary the Lay-Patron may revoke his *Presentation*; because a *Presentation* is no other than a *Commendation*, which may be by word only: And if the Case be, that one hath the *Nomination*, another the *Presentation*, the *Presentation* and *Nomination* are all one. It was then said by *Whitlock*, That in the Canon Law it is allowed to a Lay-man to vary, but not to a Spiritual man; but at the Common Law it is all one. *Doderidge* and *Jones* seemed to give the Reason thereof, when they said, That it may be intended that a Lay-man cannot at first so well judge or is able to discern of the sufficiency of the party presented, but a Spiritual-man may. *Quare*; If after Admission of the Patrons Presentee he doth afterwards again present another to the Ordinary, and the Ordinary Admit, Institute, and Induct the last Presentee, what remedy for the first? So if a Spiritual person change his *Presentation* by the consent of the Ordinary, what remedy for the First after Induction of the Second (a)?

(a) Case. *ibid.*

(10.) To the same purpose with the premisses is that which is Reported in *Stoke's Case* against *Sykes*; the Case is this, *viz.* A Lay-Patron, having the next Avoidance of a Church after the death of one *Stoke's*, Father of the Plaintiff, then Incumbent of the said Church, after the Fathers death presented *Stoke's* Son, whom the Bishop refused, for that by the Canon Law *Filius Patri non potest in Ecclesia succedere*. Whereupon the Patron presented *Sykes*; And now *Stokes* obtains a Dispensation *Non obstante* the Canon. Notwithstanding the Ordinary doth Institute *Sykes*, & causeth him to be Inducted. Whereupon *Stokes* doth sue *Sykes* and the Ordinary in the *Delegates*; and now *Banks* prays a Prohibition, and by all the Justices it was granted. And *Jones* said, That he had known it to be thrice so granted in the like case, (*viz.*) in the time of Justice *Gawdy*, as also in the time of Justice *Coke* in the Common Picas, where both Parsons claimed by one Patron: But *Doderidge* there held, That the Canon before-mentioned doth not hold in this Church; and so, said *Doderidge*, was the Opinion of a Learned *Civilian*: So by the Canon Law a man cannot have that Woman in Marriage,

(y) Case *Evans*
and *Ascough*.
Latch. Rep.
(z) *Stoke* vers.
Styles.
Latch. Rep.
fo. 253.

See this Case in
Noy's Rep.

Marriages, whom he had in Avowry before; yet that Canon doth not hold in our Church. *Doderidge* said, that the *Civilians* hold, That a Lay-Patron cannot revoke his *Presentation*, but he may *cumulando variare*, and so the Ordinary hath Election to Institute which of them he will; but that a *Spiritual* Patron cannot vary at all. But he said, that at the Common Law it is out of question, That a Patron before Institution may revoke his *Presentation*: And if a Patron present one, and the Ordinary admit him, but will not give him Institution, *Duplex Querela* lies against the Ordinary to enforce him to do his duty: But if both Parsons claim by one Patron, and the one sues a *Duplex Querela*, a Prohibition lies not before Institution. But *Jones* denied it, and said, That it had been Resolved to the contrary. *Doderidge* said, That in that case the Induction was *pendente Lite* (b). And in *Calvert's Case* against *Kitchin* (b) *Stokes* vers. *Sykes* Lach. it was said, that the King may revoke his *Presentation*, and by the same reason may Present another, before his Presentee is Instituted; Rep. for proof whereof it was said, That a Common person may recall his *Presentation* before the Institution, &c. for which was vouched the Book of 31 E. 1. tit. *Quare Impedit*, 135. the Abbot of *Leicesters* Case, although that *Dyer* citing it, 12. *Eliz.* fo. 292. conceives the Book contrary, but it seems to be in reason that the Law is clear, That a Lay-Patron may change, although that a *Spiritual* Patron cannot, and the reason is (as aforesaid) because a Lay-person did not know his Sufficiency perhaps at the first; but a *Spiritual* person by intentment may inform himself thereof well enough, and therefore was vouched 18 H. 7. and 1 H. 8. *Kellway's Reports*, which plainly proves that diversity: And by the 19 *Eliz.* fo. 360. in *Coleshil's Case* it is said, That when the King hath presented, a Repeal by him ought not to be admitted after Institution: And by Dy. 339. in *Yatton's Case*, the King may Repeal his *Presentation* by a new *Presentation*, without mention made of the former, except that the Second *Presentation* be obtained by Fraud. Also the King may present by *Parol*, as was said by Sir *Edward Coke* in the Lord *Windsors* Case, and as appears by 17 *Eliz.* *Dyer*, as was vouched by *Bromley* Baron in the aforesaid case of *Calvert* against *Kitchin*; where it was said by *Altham* Baron, That by the Kings death his *Presentation* determines (understand it, before Institution;) and so it is said in 34 E. 3. 8. tit. *Quare Impedit*, 11. That a presentment made by a Bishop becomes null and void by his death. And in 38 E. 3. 3. if a Bishop present and die before, &c. the King shall present anew (c).

(11.) *Nomination*, is a power, that by virtue of a Mannor or otherwise, a man hath to Nominate or Appoint a Clerk to a Patron of a Benefice, by him to be presented to the Ordinary for the same;

where Note, (1) That it may be in right of a Mannor, or otherwise (2). That the Clerk Nominated ought to be a person fit, able, and worthy (3). That it may be to a Parsonage, Vicarage, or other Spiritual promotion (4). That it ought to be to another than the Ordinary, which other shall present him to the Ordinary (d). And if one hath a Right to have the Nomination of a Clerk to a Benefice, and another Disturbs him, he cannot have a *Quare Impedit ipsum Nominare ad Ecclesiam*, but the Writ shall be *Quod permittat ipsum Præsentare*: And the Count shall be, That of Right he ought to Name a Clerk to such an one who ought to Present him to the Bishop, and that a Stranger doth disturb him of his Nomination; and in case he doth recover, the Judgment shall be *Quod Episcopus admittat Clericum ad Nominationem suam* (e).

(d) Terms of
Law verb.
Nomination.

(e) 21 H. 6. 17.
by Fulthorp.

(12.) If *A. B.* doth Grant unto *J. S.* That he shall Name a Clerk to him to the Church of *C.* when it shall become void, and that *A. B.* shall present unto the Bishop the Clerk which *J. S.* shall Nominate to him; in that case the Presentation is in *J. S.* and he shall have a *Quare Impedit*, for all the Profit is in him: and the Grant of the Nomination and Presentation is all one. But if *A. B.* doth Grant unto *J. S.* That he shall Nominate to him Two Clerks, whereof *A. B.* shall present one; in that case the Presentation is not given to *J. S.* the Grantee, because it is in the Election of *A. B.* which of the Two shall have the Benefice: And this was the Op-

(f) 14 E. 4. 2.
Smith and
Clayton's Case.

nion of the Justices in *Smith and Clayton's Case* (f).

(13.) If *A.* hath the Nomination to an Advowson, and *B.* the Presentation, if *A.* Nominates *C.* for his Clerk, and *B.* that should present *C.* doth Present *D.* for the Clerk; *A.* that hath the Nomination, shall have a *Quare Impedit*, and the Writ shall be *Quod permittat eum Præsentare*, albeit *A.* had but the Nomination: otherwise he should be without remedy; for in such cases where the party can otherwise have no Right done him, the Law will admit such Writ,

(g) Fitz. N. B.
33. b.

albeit the words therein be improper (g). And if he who had but a Nomination, corruptly agree to make a Presentation, or Nomination, this Nomination shall be forfeited to the King, within the Statute of 31 Eliz. cap. 6. as was said in *Calvert's Case* against *Kitchin* and *Parkinson* (b); and as it is said in *Flowden*, in *Hare* and *Bickley's Case*, He who hath the Nomination, hath the effect of the Advowson. Yet (as in the said Case of *Calvert*) this diversity seems to be good, That if *A.* hath the Presentation, and *B.* the Nomination to a Benefice, and the Presentor upon a Corrupt agreement, make a Presentation unknown to the Nominator, here the Nominator shall not be prejudiced within the Statute of 31 Eliz. cap. 6. (i).

(b) Dist. Case.
Lane Rep.

(i) Trin. 7. Jac.
in the Exchequer.
Calv. against
Kitchin and
Parkinson.
Lane's Rep.

(14.) In

(14.) In *Green's Case* vouched by *Atborne Serjeant* in the Case of thing against the Archbishop of *Canterbury* and one *Thomas Prust*; upon a *Quare Impedit* brought by the King, it is said, That if the Bishop Collate before the Six months incur, the Collatee is Incumbent, but the Patron may present at any time after, for that fills the Church, but not against the Patron, and binders that no Lapse may incur to another. In *Sir Henry Gawdy's Case* for the Church of *W.* the Church there became void, and within fourteen daies after the King presented one to it *Jure Prerogative*; the Presentee continues possession above thirty years, and then the Mannor and the Advowson came to *Sir Henry Gawdy*; the Church is void, and the King presents again, and was disturbed by *Sir Henry*. For that the King brought a *Quare Impedit*: and Adjudged, That the Presentation of the King within the Six months was not an Usurpation: But if he had presented in his own right, there should have been an Usurpation. When a Title by Lapse is in the King, if any present, the King may remove him during his life by *Quare Impedit*; all this appears by *Baskervill's Case*; but if the Incumbent die, the term of the King is gone, and if he Resign not, the King may present during the Life of the Incumbent: And that was a grand inconveniency, that after so long possession in that manner, the Incumbent may be removed by the King, &c. *Visd.* the Case of the King against the Archbishop of *Canterbury* and *Thomas Prust*, Clerk. *Trin. 4. Car. Hesley's Reports.*

(15.) If an Incumbent Resign, and the Usurper present within Six months, and is in for Six months, no Notice being given to the Patron of the Resignation; yet that shall bind him, and he shall be put to his Right of Advowson. Otherwise if the King had Collated, because the Induction is notorious to the Ordinary, and the Patron ought to take notice of it at his peril, to prevent the Usurpation of an Estranger (k).

(16.) There was a Question upon a Demurer in Law, If a Lapse devolves to the Ordinary, & within those Six months the Ordinary is Translated to another Bishoprick; Whether the King or his Metropolitan shall Present to that Lapse, in default that the Patron does not present? *Noy Attorney*, that the Guardian of the Spiritualities shall present whosoever he be. *Visd. Dyer 78. Pl. 103. (l).*

(17.) In a *Quare Impedit*, It was Resolved and Agreed by all upon Evidence at Barr, That a Resignation to a Proctor, does not make the Church void, until it be Accepted by the Bishop, and acknowledged before him. So that a Presentation in the mean time was void (m).

(k) *Servin 2.*
against the M.
shop of *Lincoln*
Noy's Rep.

(l) In *Robbins*
Case.

Noy's Rep.
(m) *Smith 2.*
against *Fowles*.
Noy's Rep.

(18.) A Parochial Church may be a *Donative*, and exempt from the Ordinaries Jurisdiction, and the Incumbent may resign to the Patron and not to the Ordinary; nor may the Ordinary Visit, but the Patron by Commissioners to be appointed by him. *Co. Lit.* 144. Cited *Hill. 1 Jac. B. R. Rot. 601.* between *Fairchild* and *Gaier* in Trespass for the Parochial Rectory *Donative* of *St. Burien* in Cornwall; so resolved in that Case (n). But in such case of a Parochial *Donative*, a meer Lay-man is not capable thereof, but a Clerk in Holy Orders is; for although he comes in by way of a Lay-donation, and not by Admission and Institution, yet his Function is Spiritual. As was Resolved in the said Case of *St. Burien* (o). So that a *Donative* may pass by the Gift of a Lay-Patron, without Institution or Induction (p).

(n) *Hill. 1.*
Jac. B. R. Rot.
601. Fairchild
and Gaier.
 (o) *Co. Lit.*
601.
 (p) *Da. 1, 46.*
b. & Roll.
Abr. verb.
Present. Lit. B.

(19.) In a *Quare Impedit* the Case was this; A. seized of Two parts of an Advowson, and B. of the Third part: A. presented one who died, afterwards he presented again C. who is deprived 1 *Mar* because he is a Favourer of the Religion of E. 6. B. presented D. who after is deprived, and C. restored. The Church void by the death of C. B. presents, and A. brings a *Quare Impedit*. It was Adjudged that it did not lie: And it was Agreed, That if Two have Title to present by turns, and one presents one who is Admitted and Instituted, and afterwards deprived for Crime; yet he shall not present again, but it shall serve for his Turn, because the Church was full, till a Sentence of Deprivation came: but when the Admission and Institution are meerly void, the same shall not serve for a Turn: But in this case, although the Clerk of B. was Incumbent for a time to all purposes, yet when the second Sentence came, C. was Incumbent again by force of the first Presentment, and then when he was dead, B. ought to present at his Turn (q). In another *Quare Impedit* the Case was this, viz. The Bishop of Lincoln, Patron and Ordinary Collated to a Benefice in 8 E. The Incumbent took another Benefice without Qualification, by which the first was void: The Successor Bishop in 8 Eliz. presented one E. but non constat, whether by Avoidance, Death, or Resignation: E. being in, the Bishop was translated or removed to *Windsor*: the Bishop that then was, certified that E. did not pay his Tenths, upon which the Church was void, and the Bishop Collated F. S. to the Church. The Question was, Whether the Queen might now avoid the Incumbent, to have her Presentment, which accrued to her upon the avoidance of the first Incumbent, who took a second Benefice without Qualification. The Justices at the first doubted it, but afterwards it was Adjudged for the Queen against the Bishop. *Pasch.* 30 Eliz. The Queen and the Bishop of Lincolns Case. *More's Rep.*

(q) *Trin. 41.*
Eliz. B. R.
Windsor and
the Archb. of
Canterb. Case.
Cro. par. 1.

(20.) It is out of the Canon Law, one of Cardinal Orho's Canons, That *Ne succedat in Ecclesia Filius Patris*, the Son may not succeed the Father in the same Church; or in case such happen to be so Instituted or Admitted, they are forthwith to be deprived thereof by the said *Constitution. Const. Otho. Ne succedat in Ecclesia Filius Patris*; This is indeed according to the Canon Law, though with us not practicable, by the same Law also the Son is prohibited to succeed the Father immediately in the same Prebendary, albeit to have another he is not prohibited; but if it be where the number of Prebends be not definite and certain, there he is not at all by that Law prohibited, *Extr. de fi. Praef. c. dilectus*; yea, by that Law the Son may not be a Vicar in that Church, where the Father was Rector last, *Extr. ib. ad Extirpandas, &c. Michael*. But this might be omitted; for the Question, *An Filius possit Beneficiari in Ecclesia Paterna?* is with us grown too obsolete to admit a Negative Solution.

(21.) A Presentation may be to a Deanry (r), to an Hospital (s), (r) 17 E. 3. 40. and to a Chappel (t). And if a Stranger Present to a Donative, Adjudg'd (s) 21 E. 3. 6. b. and his Clerk be thereupon Instituted and Inducted, yet it is meerly void (u); for which reason such Institution and Induction upon (t) 14 H. 3. such a Presentation shall not make that Presentative, which before Quare Impedit 183. Adjudg. was Donative. But if he that is the true Patron of a Parochial Rect- (u) Co. Lit. ory Donative, shall present to the same, and his Clerk be thereupon 344. Admitted and Instituted, that now makes it to become Presentative, and it shall never afterwards become Donative (x). (x) Co. Litt. ibid.

(22.) If a Church become void, to which a Bishop hath right to present in respect of his Temporalities, in this case, if the Bishop happen to die before he hath presented to that Church void, the King shall have the Presentation, and not the Bishops Executors (y). (y) 50 E. 3. 26. Also if during the vacancy of the Archbishoprick of York and the 9 H. 6. 16. b. Temporalities being in the Kings hands, the Denary becomes void, admit. the King shall present to that Deanry, albeit there be a Composition 4 E. 3. 26. h. Curia. between the Archbishop and the Chapter, that the Chapter shall chuse him; for *de jure* the Patronage thereof belongs to the Archbishop, yet the Composition cannot bind the King, who comes in paramount as Supream Patron (z).

(23.) Although it be admitted, that where a Common person (z) 17 E. 3. Incumbent is created a Bishop, there the King shall have the Pre- 42. Adjudg. sentation of the Church for that Turn by his Prerogative; yet it seems, if the King grant to an Incumbent, before he is Created Bishop, a Dispensation *retinere* the Church with his Bishoprick, and afterward is created Bishop, and dies Incumbent; it seems the King shall not present to the Church by his Prerogative, for that the Church is not void by his being made a Bishop, in which case the

the Prerogative gives the Presentation to the King, but by the death of the Incumbent, in which case the Prerogative doth not take place. *Co. Ent.* 474. *Hele's Case* there pleaded, that in such case the Church is void by death, and admitted, that it belongs to the Patron to Present upon his death (*u*).

(a) Rol. Abr.
ver. *Presentm.*
D. nu. 2.

(b) 12 E. 3.
Quare Imp. 56.
per Schard.

(c) *Liber Par-*
liamentorum,
21 E. 1. the
Prior of Ber-

munsey's case
adjudg'd in
Parl. 24 E. 3.
30. adjudg'd.

Rol. ubi *supr.*
lit. E. nu. 5.
(d) 11 H. 4. 9.

by all the *Justi-*
ces.
F. N. B. 34. K.
36. K. 38 E. 3. 4.

Hob. Rep. 208.
(e) 43 E. 3. 3.

(f) 17 E. 3.
40. b.

(g) *Ibid.*

(h) 19 E. 2.
Qua. Imp. 178.

(i) Rol. Abr.
ver. *Presentm.*
lit. L. 4.

(k) Rol. *ibid.*

(l) *Ibid.* &
Hob. 209.

(24.) If a Church, whereof a Bishop in right of his Bishoprick is the Patron, becomes void after the death of the Bishop and before the Seizure of the Temporalities, yet the King shall have the *Presentation* (*b*). And if a Church belonging to the Patronage of a Bishop become void, and the Bishop present and did before Institution, the King shall have that *Presentation* by his Prerogative (*c*). So if a Bishop die after Institution of the Clerk, and before Induction, the King shall have the *Presentation* by his Prerogative (*d*). Also if Lapse incur to the Ordinary, and before the Six months pass the Ordinary is Translated or dies, it seems the King shall have the *Presentation*, and not the Ordinary; or his Executors, or the Guardian of the Spiritualities. *P.* 40. *ELB. Dubitatur. Hob. Rep.* 208. in case of death. But if a Bishop having right to present to a Prebend, and present his Clerk, who is Instituted and Inducted in the Morning, and after noon the same day the Bishop dies, whereby the Temporalities come into the Kings hands, yet the King in that case may not have the *Presentation* (*e*).

(25.) The Patronage of the Deanry of an Archbishoprick doth of Common right belong to the Archbishop, and he shall Present to the Avoidance (*f*). But by Composition it may be Elective by the Chapter, and yet the Patronage remain in the Archbishop (*g*). And where a Parson ought to present to a Vicarage, if the Vicarage become void during the vacancy of the Parsonage, the Patron of the Parsonage shall present (*b*).

(26.) An *Alien*, who is a Minister may be presented to a Church, and Anciently it was usual for *Aliens* to have Spiritual promotions here, and Priors *Aliens* had great possessions in *England*, and were Parsons Appropriate (*i*); yet by the Statutes of 13 R. 2. *Ch.* 1 H. 5. *French-men* are disabled from having Benefices in *England*, and *French-men* Denizon'd: *Sed Qu.* whether they continue of force at this day (*k*). And if a meer Lay-man, or a man altogether illiterate, be presented, Instituted, and Inducted, it is not in Construction of the Common Law a meer Nullity, but such are Parsons *de facto*; but if a Woman be presented, Instituted, and Inducted, it is a meer Nullity at that Law, because her Incapacity is apparent (*l*).

(27.) If a man present his Clerk to the Bishop, and he die before he is received, he may present another; and although a man hath presented his Clerk to the Bishop, yet he may present another

at any time before the Bishop shall have received such his Clerk (m).

(28.) If J. S. Present, and his Clerk be Admitted and Instituted; before Induction J. D. cannot Present his Clerk, for the Church was full before as to a Common person, for by the Institution he had *Curam animarum*: But where a Common person presents, and his Clerk be Admitted and Instituted, yet before Induction the King (if he hath Right) may Present, and his Clerk shall be Instituted; for the Church is not full as against the King before Induction (n). But if the King hath not right to the Church in that case the Church is full by the Admission and Institution of a Common person's Clerk without Induction, as against the King, so as that he may not in that case Present (o).

(m) 38 E. 3. 36.
b. Rol. Abr. ubi
supr. lit. O.

(n) Vid. Rol.
ibid. dit. Q.

(o) Ibid. nu. 3.

(29.) If a Bishop Collate without any good Title of Lapse or otherwise, and then the Patron die after the Six months elapsed, and his Executor bring *Quare Impedit* by force of the Statute of 4 E. 3. and the Bishop and Incumbent plead Plenarty by Six months, it was Adjudged no Plea on Demurer, for that the Collation is not at any Plenarty, being *Tortious* (p). Also if a Bishop Collate without a good Title of Lapse, it puts not the Patron out of possession; but he may present afterwards, albeit the Bishop's Clerk were Instituted and Inducted (q).

(p) P. 32. El.
B. R. Rot.
2065. inter
Executors of
Smallwood

and the Bishop of Coventry and Lichfield. (q) Co. 6. Green 29. b. & Boswell 50. Co. Lit. 344.

(30.) A Common person may Present to a Church *per Parol*; and if it be by Writing, yet it is not any Deed, but only in nature of a Letter to the Bishop (r). Also the King may Present either by his Letters (s), or *per Parol* without Writing (t). But if the King be deceived in his Title, it will be a void *Presentation* (u). And if the King grant a *Presentation* by his Letters by the words [*Damus, Concedimus*] without other words of *Presentation*, yet it seems it shall amount to a *Presentation*, and be a sufficient Warrant for the Bishop to Institute him. *Dubitatur* 19 E. 3. *Quare Impedit*, 60.

(r) Co. Lit.
170.
(s) 2 E. 1. Rot.
Patentium.
membran 5.
(t) 19 E. 3.
Quare Imp. 60.
Agree. Co. Lit.
120.

A Common person by his Letter or his word may make a *Presentation* to a Benefice to the Bishop; the King may Present by Word, if the Ordinary be present, if the King under any Seal present, it is good: and M. 10 J. it was held by the whole Court, that a *Presentation* under the Great Seal, to a Church parcel of the Duchy of Lancaster is good, and need not to be under the Duchy-Seal (x). Where a man accepts a Second Benefice with Cure, without a dispensation or qualification, the First Benefice is void, and the Patron may Present; but if he doth not present, then if it is under the value, no Lapse shall incur until there is a Deprivation and Notice: But if it be above value, then the Patron must present within 6 months (y).

(u) Co. 6.
Green 29. b.
Dubitatur. D.
19 El. 517. 5.
Co. 6. Green
29. b. adjudg.
(x) Dom. Rex
vers. Emerson
Trin. 8 Jac.
rot. 1811.
Brownl. Rep.
par. 1. Action.
Quare Imp.

(y) Hill. 22. & 23 Car. 2 C. B. Rot. 680. *Shute* vers. *Higden*. Vaugh. Rep. and Arguments.

The

The King seized of an Advowson in the Right of his Dutchy of Lancaster, Presented to it under the Great Seal, and not under the Seal of the Dutchy. And Resolved, That the *Presentation* was good, for the *Presentation* is but a Fruit fallen from the Tree, and the King may Present by word, because a *Presentation* is but a Commendation of the Clerk to the Ordinary (a).

(a) The King
and Bishop of
Lincoln and
Kings Cafe.
More's Rep.

Mich. 5. Eliz.
More's Rep.

A man seized of an Advowson in Fee granted to another and his Heirs, that when the Church should become void, that the Grantee and his Heirs should *Nominate* a Clerk to the Grantor and his Heirs, and he and his Heirs should present him to the Ordinary. Resolved, That if he who hath the *Nomination* Present, he which ought to Present shall have a *Quare Impedit* against him, and *contra*.

Pasch. 30 Eliz.
More's Rep.

In *Beverley* and *Cornwell's* Cafe it was Resolved, that if any Advowson comes to the Queen for Forfeiture by Outlawry, and the Church becomes void, and the Queen presents, and then the Outlawry is reversed for Error, yet the Queen shall enjoy the Presentment, because it came to the Queen as a profit of the Advowson; but if the Church be void at the time of the Outlawry, and the Presentment be forfeited as a Chattel principal and distinct, and then the Outlawry is reversed, the party shall have Restitution of the Presentment.

(b) M. & H.
9 Jac. in Scac.
inter Calvert
& Kitchen,
per cur.

(c) Ibid. & D.
12 El. 292. 70.
16 El. 327. 4.

(d) *Dubitatur*.
D. 18 El. 348.
12 Co. 9. Holt.
132. Said to
be Resolved in
the said cafe.
of 18 El. D.
20 El. 360. 7.
admitt.

(31.) If the King dies before his Clerks Admission and Institution, it is a *Revocation* in Law of his *Presentation* (b). Or if the King present one to a Benefice, and then present another to the same without Revoking the former, or making any mention thereof; yet this also is a *Revocation* in Law of that former (c), unless the Second were by fraud or surreptitiously obtain'd. Likewise, if the Kings Presentee dies after Institution, and before Induction, that also is a *Revocation* in Law, because the King had not the effect of his *Presentation*, and so shall present again (d). Or if the King Present, and then before Institution revoke the same, but before Notice thereof to the Ordinary, the Ordinary Institute and Induct him; yet it seems that *Presentation* is well Revok'd in Law, and the Notice thereof to the Ordinary is not material as to the substance of the *Revocation*, but only to discharge him from being a Disturber. D. 12 El. 292. adjudg'd. Dyer makes a *Quere* thereof. *Dubitatur* D. 16 El. 328. Vid. 25 E. 3. 47. & Rol. Abr. ubi. supr. lit. U.

(e) 15 H. 7. 7.
b.

(f) Co. 5. Specot
58 Rol. ibid.

(32.) If the Patron, who Presents his Clerk, be *Excommunicated*, it is a good cause of *Refusal* of the said Clerk (e); it is also said to be so held in the Books of the Common Law (f). And where there are Three Joyntenants of the same Advowson, or of the next Avoidance, and only one or two of them Present, the Bishop is no Disturber if he refuse the Clerk so presented; for he is not bound to

Admit

Admit the Clerk, unless all the Joyntenants joyn in the *Presentation* (g). But where there are Three Grantees of the next Avoidance, and the Church become void, and Two of them Present, the Third being a Clerk, the Ordinary in that case is to Admit him, for that he cannot joyn in a *Presentation* of himself, and he may relinquish his Title, and accept the *Presentment* of the others (b). (g) D. 14. EL. 304. 54. Rol. ib. lit. Y. (b) 2. D. 14. E. 304. 54. Rol. ibid.

(33.) A. the Defendant had been Parson for Three years; and pleaded Plenary generally by 6 months of the *Presentation* of one *Styles*, a Stranger to the Writ: and the Court held the Plea to be naught, because the Defendant shewed no Title in *Styles* (i).

(34.) In the Case between *Phillips* and *Hayter* Prohibition was granted for the Church of T. the Suit being in the *Archdeacon* after Induction to avoid the Institution, for that the Institution was made after a *Carveat* entred, Not to grant Institution, &c. for that doth not make the Institution void at the Common Law (k). (i) *Cranwel.* verf. *Lifter.* Brownl. Rep. pa. 1. *Alliens* on *Qua. Imp.* (k) Mich. 15. Car. B. R. between *Phillips* and *Hayter*, per Cur. and *Hutton's* case. Hob. Rep.

(35.) In a *Quare Impedit*, A. and B. severally Patrons of the Ministry of the Church of S. in Fee to Present by turns; A. Presents his Clerk, who is Admitted and Inducted. The Church is void again, B. Presents his Clerk, who is likewise Inducted, and after is deprived. The Bishop *Collates* without giving notice of the Deprivation. A. grants his Advowson to J. S. in Fee; the Clerk *Collated* by the Bishop died: B. Presenteth, and is disturbed. *Resolved*, (1) When A. had right to Present upon the Deprivation, as in his Turn (although the *Collation* of the Bishop was not good) yet it was but a thing in *Action*, and when he had granted the Advowson over, the Grantee could not have this thing in *Action*, nor the Grantor could not have it, for he had destroyed it, and so none could have it (2). *Resolved*, although the Grant was sufficient to pass the Advowson in Fee, yet the *Collation* of the Bishop was good against all, but against the very Patron, so as he might have removed the Incumbent by a *Quare Impedit*; but when he doth not remove him, so as he dies Incumbent; this is as a serving of his Turn, and a good Plenary and Incumbency against him (l).

(36.) In a *Quare Impedit* the Defendant pleaded, That the Divine Service there was in the *Welsh* Tongue, and the Parishioners understood not the *English*; and the *Presentee* could not speak *Welsh* and therefore he refused him: It was the Opinion of all the Justices, That it was a good cause of *Refusal* of him, for he cannot instruct his Flock according to his duty and charge. But in this Case it was held, That Notice ought to be given to the Patron himself, if he be within the County, if not, publick Intimation to be on the Church-door. (l) Hil. 40. El. B. R. *Leak* and the Bishop of *Coventry's* case. Cro. par. 1. *Alkany* and the Bishop of St. *Asaph's* case. Cro. par. 1.

(37.) In a *Quare Impedit* brought in a Case between *La.* and *Lo.* it was held, That the King cannot be a Disturber; but the Bishop

Mich. 3 Jac.
B. R. *Lancaster*
and *Low's*
Case.
Cro. par. 2.

may be a special Disturber; and in that case it was said, It is good policy upon every *Presentation* by Usurpation, to bring a *Quare Impedit* as speedily as may be; and it is as good policy to name the Bishop in the Writ, for then he shall not Collate for Lapse, if the Church remain void Six months; nor shall the Metropolitan Collate, if the time come to him, for the same Lapse: For it was said to be a Rule, That the Metropolitan shall never Collate for Lapse, but when the immediate Ordinary might have Collated, and hath surceased his time: and in such case the Ordinary cannot Collate, because he is made party to the Writ.

Cro. par. 1.

(38.) In the Case between *Bennet* and the Bishop of *Norwich* it was Adjudged, That if the next Avoidance of a Church be granted to *A.* and *B.* and *A.* Release to *B.* and after the Church become void in that case *B.* may present, and upon Disturbance have a *Quare Impedit* in his own name.

Paish. 26. El.
B. R. the Bish.
of *Hewford's*
Case.
Cro. par. 1.

(39.) If the Bishop shall for Insufficiency refuse the Clerk that is presented to him, he may not afterwards Admit him: and therefore where the Patron presented *J. S.* his Clerk to the Bishop, and upon Notice by the Bishop given to the Patron of the Insufficiency of the Clerk, the Patron presented another Clerk, and then the Bishop admits the first Clerk which was presented within Six months: in this case it was Adjudged, That the Bishop was a Disturber; for having once refused him for Insufficiency, he cannot afterwards accept of him.

CHAP.

CHAP. XXIV.

*Of Examination, Admission, Institution,
and Induction.*

1. *What is here meant by Examination, where enjoyed, how, and by whom, and at what time to be performed.*
2. *In what case the Bishop is held at Common Law a Disturber, in refusing one Clerk and Admitting another.*
3. *The Ordinary, as he is not obliged to Examine the Clerk at some certain times; so he may not refuse to examine him during all the Six months.*
4. *Although the Six months be Elapsed, yet if the Patron Present, the Church not being Full, the Bishop ought to Admit his Clerk.*
5. *How an Usurpation upon a Lease for years puts the very Patron out of possession.*
6. *Admission what; and under what qualifications it ought to be.*
7. *What the Remedy, where the Ordinary doth refuse to Admit the Clerk; the Form of such Admission.*
8. *What Institution is, and the Form thereof according to the Canon Law; what required of the Clerk in order thereto, and his Remedy in case the Ordinary denies him such Institution as he may claim by Law.*
9. *Matters of Institution properly cognizable in the Ecclesiastical Courts, yet in certain Cases not exclusively to the Common Law or Temporal Jurisdiction.*
10. *Institution gives the Parson jus ad rem, not jus in re.*
11. *Whether Institution without Induction works a Plenary? also whether it be good, being Sealed with another Seal, and done out of the Proper Diocese? The difference between the Common Law and the Canon Law as to a Caveat entred before Institution.*

12. *Whether Suit may be in the Ecclesiastical Court to remove an Incumbent after Induction ?*
13. *Whether the First-Fruits be due upon the Institution before Induction ?*
14. *A Case at Common Law touching Resignation; and whether it may be made Conditionally ?*
15. *A Case touching the Rightful Patron's Presentation, after the Induction of another by Usurpation.*
16. *What Induction is, and the Bishops Order therein.*
17. *Induction is a Temporal, not Spiritual Act : In what manner it is to be executed.*
18. *A Caveat entred in the Life-time of an Incumbent is void.*
19. *In what Case an Induction made by a Minister not resident within the Archdeaconry, may be good.*
20. *Institution to a Minor and Under-age is meerly void.*
21. *Whether after Induction, the Institution may be questioned in the Ecclesiastical Court.*
22. *Whether Incumbency be triable only at Common Law.*
23. *In what Court the validity of Induction is determinable.*

(1.) **E**xamination is that Trial or Probation, which the Bishop or Ordinary makes before his Admission of any person to holy Orders or to a Benefice, touching the qualification of such persons for the same respectively. So that there are Two certain times or seasons especially, wherein this Examination is required; the one before an Admission to Holy Orders, the other before an Admission to a Benefice. The former of these is expressly enjoined by the 35th Canon Ecclesiastical, whereby it is required, That the Bishop, before he Admit any person to Holy Orders, shall diligently Examine him in the presence of those Ministers that shall assist him at the Imposition of hands, or in case of any lawful Impediment of the Bishop, then the said Examination shall be carefully performed by the said Ministers, provided they be of the Bishops Cathedral Church, if conveniently it may, otherwise by at least Three sufficient Preachers of the same Diocese. And in case any Bishop or Suffragan shall Admit any to Sacred Orders, who is not Examined as is before ordained, then shall the Archbishop of the Province, having notice thereof, and being assisted with one Bishop, suspend the said Bishop or Suffragan from making either Deacons or Priests for the space of Two years (a). So also when the Clerk is presented by the Patron of the Advowson, before he be Admitted as Clerk to serve the Cure, the Ordinary is to Examine him of his Ability: For if upon his Examination he be found unable to serve

(a) Canon 35.
Ecclesiastical.

serve the same, or be *Criminous*, the Ordinary may refuse to Admit and Institute him into the benefice (b). By the Ancient *Canons* (b) *Cn. 5. par.* the Bishop hath Two months time to enquire and inform himself *Specer's Case.* of the sufficiency and quality of every Clerk presented to him, as appears by the Canon in 1 *Fac. cap. 95.* But by the said Canon it is Ordained; That the said Two months shall be abridged to 28 days only (c). Upon sufficient enquiry and Examination the Ordinary (c) *Rol. Abr.* may accept or refuse the Clerk Presented; and regularly all such *ver. Presentmt.* matters as are causes of *Deprivation*, are also causes of *Refusal* (d); *lit. X.* but for a Presentee to have another Benefice, is no cause of Refusal, *(d) Co. 2.* for that is at his own peril; and possibly the Second Benefice is more *Specer 58.* worth than the former, which only is void in such case (e). *(e) 14 H. 7.*

(2.) If the Bishop doth demand of the Clerk his Letters of Or- *28. b. Cur. e.* ders, and Letters Testimonial of his good behaviour, and the Clerk requires time to shew them, as the space of a week or the like, because he hath them not there with him; and the Bishop doth thereupon refuse him to the Church, and presents another: the Bishop in such case hath been adjudged to be a Disturber; for the Statute of 13 *Eliz.* doth not compel the Clerk to shew his Orders, nor Letters Testimonial of his good behaviour: And so it was Adjudged (f). Yet by the 39th Canon it is by way of Caution expressly (f) *Pasch. 33.* Ordained; That no Bishop shall Institute any to a Benefice, who *Eliz. C. B.* hath been Ordained by any other Bishop, except he first shew unto him his Letters of Orders, and bring him a sufficient Testimony of *Palmer and the Bishop of Peter-* his former good life and behaviour, if the Bishop shall require it. *borough's Case.* *Leon. 230.*

(3.) Examination of the Clerk is to be done at a convenient time within Six months; for the Ordinary cannot refuse to Examine the Clerk during all the Six months, and so suffer a Lapse to incur to himself; for by so doing the Patron should lose his *Pre-* sentation, and the Ordinary take advantage of his own wrong. But if the Ordinary, when the Clerk comes to be examined, *Sedes circa curam Pastoralem*, he is not then obliged to leave the business in hand, and presently Examine the Clerk; but he may appoint a convenient time and place for the Examining of him (g). This Exa- *(g) Mich. 15.* mination by the Diocesan, touching the *Conversation* and Ability *Jac. C. B. Ad-* of such as were ordained to Preach the Word of God, or Presented *Judg'd. vid.* to a Benefice, is enjoyed by the Provincial Constitutions, *Lindw.* *acc. 5 H. 7. 7.* *Co. 5. par.* *Specer's Case.*

(4.) A *Quare Impedit* was brought by B. against the Bishop of Rochester, who pleads, that he claims nothing but as Ordinary; and yet pleads further, That the Clerk which the Plaintiff presented, had before contracted with the Plaintiff *Simoniacally*, and therefore because he was *Simoniacus* he refused, and that the Church was then void, and so remained void; whereupon the Plaintiff had

a Writ to the Archbishop of *Canterbury*, who returned, that before the coming of this Writ, *viz.* 4. *July* the Church was full of one Dr. *Grant*, *ex Collatione* of the said Bishop of *Rocheſter*, who had Collated by Laſpe, and this Return was Adjudged Inſufficient : Firſt, it is clear, That though the Six months paſs, yet if the Patron preſent, the Biſhop ought to Admit, although it be after the Title devolved unto the *Metropolitan* : And it ſeems alſo Reaſon, that he ought to Admit, though that the Title by Laſpe be accrued to the King, for he claims it as Supream Ordinary. *Vid. Dyer 277. quere.* But in this Caſe the Biſhop who is the Defendant, is bound by the Judgment, and the Writ is, notwithstanding the claim of the Biſhop, that he Admit the Clerk; for the Biſhop ought to execute the Proceſs of the Court. It was urged by Serjeant *Henden*, that there is a Canon in *Lindwood*, That if the Church be vacant when the Writ comes to the Biſhop, that he is bound to execute the Writ; but if it be Full, then he certifies the Juſtices: And the Archbiſhop is Sworn to the Canons, and he vouched 22 *H.6.45. Coke*, lib. 6. 49, and 52 *Dyer 210.FN.B.47. Dyer 364.14 H.7.22.34 H.6.41.9 E.3. Quare non admittit. 18 E.4.7. (b).*

(b) *Boſton* a-
gainſt the Bi-
ſhop of *Re-
cheſter*.
Hutt. Rep.

(5.) In *Rud's* Caſe againſt the Biſhop of *Lincoln*, it was among other things Reſolved by the Court, in a *Quare Impedit*, That when one uſurps upon a Leaſe for years, that this Uſurpation gains the Fee, and puts the very Patron out of Poſſeſſion; and though by the Statute of *Weſt. 2. cap. 5.* he in reversion after the Leaſe may have a *Quare Impedit* when the Church is void, or may preſent, and if he Preſent, and his Clerk be Admitted and Inducted, that then he is Remitted; yet until it be recovered, or his Clerk be in, the Uſurper hath the Fee, and againſt him lies the Writ of Right, &c. Alſo that the Patron, which hath recovered in a *Quare Impedit*, may Preſent, and that being accepted, an Inſtitution and Induction enſuing thereupon, it is good (i).

(i) *Rud* verſ.
the Biſhop of
Lincoln.
Hutt. Rep.

(k) *Co. on. Lit.*
fo. 334. a.

(l) 3 *R. 2.*

7 *H. 4. 1 H. 5.*

& *Rot. ar.*

6 *H. 4. nu. 43.*

& 4 *H. 6. nu.*

29

(m) *Co. 4. par.*

Inf. cap. 74.

§ *Conſiſtory*

Courts.

(6.) *Admiſſion* is when the Biſhop upon Examination of the Clerk *Admits* him to be able and ſufficient, ſaying *Admitto te habilem* (k). The Lord *Coke* in the Fourth Part of his *Inſtitutes* ſays, That upon conſideration had of the ſeveral Statutes (l) (whereof mention is there made,) If an *Alien* or Stranger born be preſented to a Benefice, the Biſhop ought not to *Admit* him, but may lawfully reſuſe him (m). There are ſeveral things which the Statute-Law of this Realm doth require in him, which ſhall be *Admitted* to a Benefice; for no perſon may be admitted to any Benefice with Cure, except he then be of the Age of 23 years at leaſt, and a Deacon, and ſhall firſt have ſubſcribed the 39 *Articles* in the preſence of the Ordinary, and publickly read the ſame in the Pariſh-Church of that Benefice, which Declaration of his unſeigned Aſſent there-

thereunto; and except he be Admitted to Minister the Sacraments within one year next after his Induction (if he were not so Admitted before) he shall upon every such default be *ipso facto* deprived. And none shall be made a Minister, or Admitted to preach or Administer the Sacraments under the Age of 24 years, unless he bring with him to the Bishop a sufficient Testimonial, and be able to render an account of his Faith in *Latin*. All which appears by the Statute of the 13th of *Eliz.* whereby it is likewise Provided, That none shall be Admitted to any Benefice with Cure, or above the yearly value of Thirty pounds in the Kings Books, unless he shall then be a Bachelor of Divinity, or a Preacher lawfully allowed by some Bishop within this Realm, or by one of the Universities of *Oxford* or *Cambridge*; and that all Admissions to Benefices, Institutions, Inductions, Tolerations, Dispensations, Qualifications, and Licenses whatsoever, made contrary to the Premises, shall be utterly void in Law (m). And by the Three and thirtieth Canon of the *Ecclesiastical Constitutions*, Ratified and Confirmed by King *James* under his Letters Patents, *An.* 1603. it is in Conformity to many Decrees of the Ancient Fathers, further Ordained, That no person shall be Admitted into Sacred Orders, except he shall at the same time Exhibit to the Bishop a presentation of himself to some Ecclesiastical preferment then void in that Diocese; or bring to the said Bishop a True and undoubted Certificate, that either he is provided with some Church within the Diocese, where he may attend the Cure of Souls, or of some Ministers place vacant, either in the Cathedral of that Diocese, or in some other Collegiate Church therein also situate, where he may exercise his Ministry: or that he is a Fellow, or in right as a Fellow, or to be a Chaplain in some Colledge in *Oxford* or *Cambridge*: except he be a Master of Arts of Five years standing, that liveth of his own charge in either of the Universities: or except by the Bishop himself that doth Ordain him Minister, to be shortly after to be Admitted either to some Benefice or Curateship then void: And in case any Bishop shall admit any person into the Ministry, not qualified as aforesaid, he is to keep and maintain him, till he prefers him to some Ecclesiastical Living, on pain of Suspension for one year from giving of Orders, by the Archbishop assisted with another Bishop (n).

(7.) If a Bishop shall refuse to Admit the Clerk, the Writ of *Quare non Admisit* may lie in the Case (o); yet the Ordinary, before he Admits the Clerk Presented, may take a reasonable time, to examine him; and if upon Examination there be just cause of Exception in respect of the Clerk presented, or otherwise in respect of the Patron presenting, he may justify the non Admission of him, for this Admission is no other than the Ordinary's Allowance

(m) St. 13 *Eliz.*
cap. 12.

(n) Canon *Ecclesiastical* 23.
(o) *Hill.* 8 *Car.*
B. R. rot. 454.
Cart. vers. *E.*
pisc. 2^a. *Dr.* 19.
Croke.

(p) F. N. B.

38 and Regist.

of Writs, fo. 33. a

(q) Mich. 10.

Jac. rot. 2642.

Celt and Glover

vers. Bish. of

Cov. and Lichf.

Hob. Rep.

ance of a Clerk presented to a Church that is void. But if th^e Bishop refuse to admit the Clerk presented to him by the Patron, as scrupling the said Patron's Right of Presentation, and the said Patron after recover his Right of presentation against the Bishop in the Common Bench, he shall then have the Writ of *Admittendo Clerico* (p). Hobart Chief Justice, in the Case of *Celt and Glover* against the Bishop of *Coventry and Lichfield*, compares this Admission and such Acts of the Ordinary to the Admittance of a Copyholder upon Surrender, specially where the Admission of one be upon the Resignation of another Incumbent: And he is there of opinion, That if a Parson Appropriate (which is Patron) Present, and his Clerk be not Admitted, but refused for just cause and Notice given, the Lapse shall incur (q). The usual Form or Tenor of an Admission into a Rectory or Parsonage runs in this manner, viz. I. A. B. by virtue of this Instrument from John Lord Bishop of L. in his Triennial Visitation, to all Clerks, Rectors, Vicars, Ministers, Chaplains, and Curates whatsoever within this Diocese directed, do Admit F. G. into real, actual, and corporal possession of this Church of R. together with all the profits, dues, members and appurtenances whatsoever thereunto belonging, In the presence of those whose Names are under written.

(8.) Institution according to the Canon Law, is no other than a Verbal Collation to a Benefice or some other Ecclesiastical Living, *De Instit. lib. 4. Decretal. & Sexti.* and is by that Law taken for an Investiture; *c. ad hac, de Offic. Archid. c. cum venisset, dic. tit. de Inst.* For when among the Romans a Clerk was Instituted; the Custom was, that by a Verbal Collation the Clerk was invested in the Benefice, by the delivery to him of a Ring, Staff, Cap, Pen, or the like, in the nature of Livery and Seisin: in token of his possession of the thing to which he was so Instituted: *c. cum olim, de re Judic. cap. ex ore, de iis quæ si à Prælat. & cap. ut nostrum, de Offic. Archidiac.* Somewhat in resemblance to our Tenants by the Verge, or such as are Admitted by the Rod in the Court of antient Demesne. But this Institution as practicable with us, consists in the Letters of Institution directed from the Bishop or Ordinary, in whose Diocese the Church is, to the Clerk the Presentee, by which he Admits him as lawful Incumbent to that vacant Church whereto he is Presented by the Patron thereof; the said Clerk having not only first taken the Oaths of Allegiance and Supremacy, with Renunciation of all Foreign Powers and Jurisdictions, according to the Laws and Statutes in that behalf provided, but also of Canonical Obedience to the Bishop of that Diocese and his Successors, and that he hath made no Simoniackal contract, for or concerning the said presentation; whereupon the said Bishop or Ordinary doth by his said Letters
of

of Institution constitute and invest the said Clerk Rector of the Rectory of the said Parochial Church, *cum cura animarum Parochianorum*, together with all Rights, Priviledges, and Emoluments belonging to the same, *Juribus & Consuetudinibus Nostri Episcopatus, & Ecclesie nostrae Catb. &c. Dignitate & honore in omnibus semper salvis*. *Diocesis idem significat in effectu quoad Jurisdictionem Ecclesiasticam, quod Territoriam quoad Jurisdictionem Temporalem*. Ita Andræ, & D. D. in c. cum Episcopus, de Offic. Ord. lib. 6. *Diocesis significat locum Spiritualem, sicuti Territorium locum Temporalem*. Alberic. in suo Dist. ver. *Diocesis*. This Institution to a Benefice may not, by the 39th. Article of the Canons, be to any person preordained, except the first shew the Bishop his Letters of Orders, as also (if he require it) a Testimonial of his former good life and behaviour. Moreover, by the Law he is obliged to subscribe the Articles of Religion, to Swear Canonical Obedience to the Archbishop of Canterbury and his Successors, and to his Diocesan; and for his Personal Residence, if it be a Vicarage. *Furamentum de Canonica Obedientia, viz. Ego A. B. juro, quod præstabo veram & Canonicam Obedientiam Episcopo Londinensi ejusque Successoribus, in omnibus licitis & honestis. Sic me Deus adjuvet*: If a Clerk should kill his Prelate, to whom he hath Sworn Canonical Obedience, it is Petty Treason. *Vid. 19 H. 6. 4. 7. b. vid. Stat. 25. E. 3. De Prodit. cap. 2.* But if the Diocesan, notwithstanding the exhibiting the Presentation before him, or his Vicar General, having power to Institute, and notwithstanding Requisition made him by the Clerk Presented in order to Institution, shall refuse to Institute and admit him; he may thereof enter his Complaint before the Dean of the *Arche*, who thereupon sends his Letters to the said Bishops, which Letters or Rescript is termed *Duplex Querela*: So that as to the substance of the Premises touching this Subject, the practice with us at this day doth well nigh correspond with the Ancient Canon Law, whereby it is expressly Ordained, *lib. 3. Decretal.* That all Ecclesiastical Livings and Benefices shall be had by Institution, to be by the Bishop or his Chancellor, or such other as hath Episcopal Jurisdiction, positively declaring, That without such Institution, neither any Benefice is lawfully obtained, nor can be lawfully retained: Adding withal, That Benefices void ought to be granted within Six months after knowledge of the voidance thereof, otherwise the Grant thereof devolves and comes to the Superiour, and that he who doth cause or procure himself to be Instituted into a Benefice, the Incumbent thereof being alive, shall be deposed from his Orders, *Decretal. ibid.*

(9.) Albeit the Cognisance of this matter of *Institutions* is so properly and connaturally inherent in the Ecclesiastical Jurisdiction, yet the Temporal and Common Law it seems hath in some cases took notice thereof, for it is there Reported, That every Rectory doth consist upon Spirituality and Temporality: As to the Spirituality, *viz. Cura animarum*, the Presentee is compleat Parson by *Institution*; for when the Bishop upon Examination finds him able, then he doth Institute him in these words, *viz. Instituo te ad tale Beneficium, & habere Curam animarum* of such a Parish *Accipe*

(r) 41 El. B.R. *Curam tuam & meam.* (r) And the very *Institution* to a Benefice the Law understands as an acceptance, and the having of a Benefice; as in that Case of *Digby*; where it is held, That if a Clerk be Presented, Admitted, and Instituted to a Benefice with Cure, to the value of 8*l.* and afterwards and before *Induction* he accepts of another Benefice with Cure, and is Inducted in the same; the First Benefice is void by the Statute of 21 H. 8. For the words of the Statute are, *A Parson, having one Benefice with Cure, &c. Accepts and takes another, &c.* And he who is Instituted to a Benefice, is said to have Accepted a Benefice, and to have a Benefice. (1) And he that is *Instituted*, may enter into the Glebe-Lands before his *Induction*, and hath right to have it against any Stranger whatever. (2)

And albeit by the Civil and Canon Law an *Institution* granted after a *Caveat* Entred is void, yet by the Common Law it is otherwise (u).

(1) Co. ibid.
Digby's Case.
(2) Pasch. 13.
Jac. B. R. per.
Co. Rol. Rep.
(u) P. 13. Jac.
B. R. Case.
Hitchin and
Glover.
Rol. Rep.

(10.) By the *Institution* the Parson hath only *Jus ad rem*, he hath not *Jus in re* until he hath *Induction*; and therefore if a Prebendary, Parson, or Vicar, after he is admitted and Instituted, and before he be Inducted, grant an Annuity out of his Prebend, Parsonage, or Vicarage, and the same be Confirmed by the Patron and Ordinary, or by the Dean and Chapter, yet this shall not charge the Glebe, or the Successor of the Prebendary, Parson or Vicar: for although by his *Institution* he hath (as aforesaid) *Jus ad rem*, yet he hath not *Jus in re*, but the charge in such case shall lie upon the Person of the Prebendary, Parson, or Vicar, and not upon the Lands (x).

(x) 5 Eliz.
Dyer 221. vid.
Hare and
Birkley's C.
Plow. com.
528. acc.
(y) 18 Eliz. in
Gile Case. vid.
Co. 10. par.
132. in *Hols*
Case. vid. 10.
Eliz. Dyer. 348.
Weston's Case
acc.

(11.) The Church at this day, since the Statute of *Westm. 2.* is not Full by *Institution* of the King; and therefore if the King hath a Title by Lapse to Present *pro hac vice*, and he Presents, and his Clerk be Instituted, but dies before *Induction*, the King in that case may Present again; and so it hath been Adjudged. (y) Which plainly shews, that *Institution* without *Induction* doth not work a Plenarty. It hath also been held, That the Letters of *Institution* Sealed with another Seal, and made out of the Diocess, are good enough

enough. (z.) Or if a *Caveat* be Entred with a Bishop, and he after grant *Institution*, yet the *Institution* is not void by the Common Law; otherwise by the Spiritual Law. (a) Notwithstanding what was just now said, it is Adjudged in *Digbie's* case, That a Benefice istaken, received and had by Institution only; and therefore a Qualification or dispensation following comes too late. (b) So that if a man having one Benefice with Cure by Institution only, accept another by Institution only, without Dispensation, the Common Law makes Avoidance Actual, if the Patron will (c).
 (z.) Hill. 8. Cha. rot. 454. B. R. Cort verſ. Bishop of St. Davids. Cro. Rep. (a) Paſch. 13. Jac. B. R. Hitchings verſ. Glover. Rol. Rep. (b) Co. lib. 470. (c) Mich. 10 Jac. rot. 2642. Colſ & Glover verſ. B. of Ceu. and Liſch. Hob. R.

(12.) Proceedings being in the Ecclesiastical Court to remove an Incumbent after *Induction*, a Prohibition was granted to stay the same: One *Oliver* sued a *Quare Impedit* against *Hussey*, and while that depended, *Hussey* was Instituted and Inducted, and *Oliver* sued *Hussey* in the Spiritual Court to remove him. *Noy* prayed a Prohibition, First because he may not sue in Two Courts for the same cause: Secondly, because it is a Suit after Induction; and upon that last point the Court granted a Prohibition (d).

(13.) In the Case of *Dennys* against *Drake* it was said, That if a man be Instituted to a Benefice, he ought to pay the First-Fruits before *Induction*, by the Statute: but by the Common Law it was otherwise; for he is not to have the Temporalties until *Induction*, and therefore he could not pay the First-Fruits; but another person cannot be Presented to his Benefice during the continuance of the First *Institution*. And an *Institution* to a Second Benefice is a present Avoidance of the First (e).

(14.) *G.* Parson of the Church of *E.* did by Instrument in Writing Resign his Benefice before a Notary publick, and others, into the hands of the Bishop; and the Resignation was absolute and voluntary, and to the use of *M.* and *B.* or either of them. And it was further inserted in the said Instrument of Resignation, *Protestatione & sub Conditione, quod si aliqui eorum non Admissi fuerant per assensum Episcop. infra Sex menses, quod tunc hac præsens Resignatio mea vacua & pro nulla habeatur, & nunc prout tunc, & tunc prout nunc*; and *Cestuy que use* came within the time limited to the Bishop, and did offer to Resign to him, which the Bishop refused to accept, &c. *Crook* for the Plaintiff; Forasmuch as the Plaintiff may Resign on Condition as well, as a particular Tenant may Surrender upon Condition, and Two Parsons may Exchange, and if the Estate be executed on the one part, and not on the other, that Parson whose part was not Executed, may have his Benefice again, as it is adjudged in 46 E. 3. But *Coke Sollic. & Godfrey* were one the contrary Opinion: For that the Incumbent may not Transfer

(d) *Oliver* verſ. *Hussey*. Latch. Rep.

(e) Case *Dennys* verſ. *Drake*. Lane's Rep. Vid. Co. lib. 4. *Digbie's* Case. fo. 79. Resignation of a Benefice.

his Benefice to another without Presentation, as appears in the recited Case of 46 E. 3. Also the Resignation is not good, and the Condition void, because it is against the nature of a Resignation which must be *Absolutè, Spontè, Purè, & Simpliciter*, and is not like to a Condition in Law, as in the said Case of *Exchange* of 46 E. 3. for the Law doth annex a Condition to it, but a Collateral Condition cannot be annex by the parties themselves: Also this is an act Judicial, to which a Condition cannot be annex'd, no more than an Ordinary may admit upon Condition, or a Judgment be confessed on Condition, which are Judicial Acts. But admitting the condition to be good, yet a new Induction ought to be made by the Ordinary, for the Church became one time void, and is not like to the case in 2 R. 2. *Qu. Imp.* 143. Where Sentence of Deprivation was given, and the Sentence presently reversed by Appeal, there needs no new Institution, for that the Church was never void. And upon Arguments given in Writing by the Civilians to the Judges, the Judgment was entred, *Quod querens nihil capiat per Billam.* (e) (15.) In *Rud's* Case against the Bishop of *Lincoln*, it was (*inter alia*) Resolved by the Court, That when one having a good Title to Present, and an Incumbent by Usurpation is Admitted, Instituted and Inducted, and after that the Patron Presents, and the Bishop refuse, and after the Patron recover, and then he which had this Presentation, exhibits it to the Bishop; this is now a good presentation and the Patron cannot revoke or give him a new Presentation: But if the Patron before the death of the Incumbent make Letters of Presentation, that is void, because he had no Title to Present (f).

(e) 34 Eliz.
C. B. Gayton's
Case.
Owens Rep.

(f) The afore-
said Case of
Rud vers. the
Bishop of
Lincoln.
Hutt. Rep.

(g) 15 H. 4.
76. b. 14 H. 6.
Qua. Imp. 162.
38 H. 6. 15.

(16) *Induction* is nothing else but the putting of the person into Actual possession of the Church and Glebe, which are the Temporalities of the Church; or the making of a Clerk compleat Incumbent of a Church: This is *Induction*, (g) and it is by Letters from the Bishop of the Diocess directed to all and singular the Clerks, Rectors, Vicars, &c. within the said diocess, to put the Clerk or his lawful Attorney for him, and in his name, into the Actual possession of the Church to which he had been presented and instituted, together with all the profits, dues, members, and Appurtenances whatsoever thereunto belonging or appertaining; of the due execution whereof a Certificate endorsed on the Instrument of *Induction*, and Subscribed by a competent number of Witnesses, ought to be returned to the said Bishop or Ordinary, who may appoint the Archdeacon to give *Induction*; (h) yet by Prescription it seems the Dean and Chapter of *Pauls*, as also the Dean and Chapter of *Lichfield* may give *Induction*. (i) It is also said, That an *Induction* made by a Bishop is void, where it belongs to a Dean and Chapter by Prescription: (k) But an *Induction* by the Patron

(h) 38 E. 3. 3. b.
(i) 11 H. 4. 9.
(k) *Ib.* Contr.
14 H. 6. *Qua.*
Imp. 162. ad
Judg'd of a
Prebend.

is void; (l) yet the King's Grantee of a Free Chappel shall be put into possession by the Sheriff of the County, and not by the Ord-
nary of the place (m).

(17.) This Induction is not a Spiritual, but a Temporal Act; and therefore if after the Clerk hath been Presented by the Patron, and Admitted and Instituted by the Bishop, the Archdeacon shall refuse to Induct him into the Benefice, an Action upon the Case lieth for the Clerk against the Archdeacon. (n) And after the Incumbent is thus Inducted, he may then plead any Plea in Bar of a *Quare Imp.* brought against him which concerneth his Possession; and so may plead a Release in Bar, because he hath the Freehold in him, which shall not be lost without his Answer: (o) For by this Induction or being led into the Church he hath, as it were, Livery and Seisin thereof given him as the lawful Incumbent by delivery of the Keyes of the Church to him, and that by order of the Bishop; whereof Publication is then made to the Parishioner by ringing one or more of the Bells: (p) And if a Parson hath his Presentation, Admission, and Institution, and that upon a lawful Title, yet he is not a possessor of the Parsonage according to the Letter of the Law till his Induction, (q) Which Induction is (as aforesaid) a Temporal Act, and (as the Opinion of the Court was in *Hutton's Case*) Triable by Temporal Law; and since by Induction the Church is Full, it is not to be avoided, but by a Suit of *Quare Impedis* or the like, at the Common Law, and not to be determined by alledging Insufficiency in the Institution in the Court Ecclesiastical, for that may come in question upon the Trial of the Induction at the Common Law, which will not be good, if the Institution were not good: All which was also the Opinion of the Court in the Case aforesaid; (r) for if the Question be, whether Parson or no Parson, which comprehends Induction, it is Triable at the Common Law. (s) And although by the Institution the Church is Full against all persons save the King, yet he is not compleat Parson till Induction; for though he be admitted *ad Officium* by the Institution, yet he is not entitled *ad Beneficium* till Induction (t).

(18.) In an *Ejectione Firme* brought by the Lessee of Rome, Incumbent of the Church of D. it was found by Special Verdict, that the King was the true Patron, and that *Wingfield* entred a *Caveat*, in *uita Incumbentis*, he then lying in *Extremis*, scil. *Caveat Episcopus ne quis admittatur, &c. Nisi Convocatus* the said *Wingfield*; the Incumbent dies; Nauntou a Stranger Presents one *Morgan*, who is Admitted and Instituted; afterwards the said *Wingfield* Presents one *Glover*, who is Instituted and Inducted, and afterwards the said Rome procures a Presentation from the King, who was Instituted and

(l) 11 H. 4. 10.
(m) 14 H. 4.
11. b. & Rol.
Abr. ver. Pre-
sentm. lit. C.

(n) Pasch. 23.
Eliz. C. B. 2d.
judg. Godb.
23. vid. Fitz.
N. B. 47.
29 H. 8. 3. by
Knightly.
(o) 4 H. 8.
Dyer. 1.

(p) Vid. Cro.
Rep. par. 3.
fo. 258.
(q) Pasch. 17.
Jac. C. B. Sir
W. Elwis vers.
Archbishop
of York and
others.
Hob. Rep.

(r) Sir Tim.
Hutton's Case
C. B. Hob.
(s) Trin. 13.
Jac. B. R.
Glover against
Shedd.
Rol. Rep.
(t) Plow. 528.

and Inducted: And then it came in question in the Ecclesiastical Court, who had the best right; and there Sentence was given, That the First Institution was *Irrita, Vacua, & Inanis*, by reason of the *Caveat*, and then the Church being Full of the Second Incumbent, the King was put out of possession, and so his Presentation void: But it was Adjudget and Resolved by all the Court for *Rone*: For (1.) It was Resolved, That this *Caveat* was void, because it was in the life of the Incumbent. According to the Common Law, If a *Caveat* be entred with the Bishop, and he grant Institution afterwards, yet it is not void: After a *Caveat* entred, Institution is not void by the Common Law. *Pasch. 13 Jac. B. R. Hitchin vers. Glover. Rot. Rep. & Cro. par. 2.* (2.) The Church upon the Institution of *Morgan* was Full against all but the King, and so agreed many times in the Books, and then the Presentation of *Glover* was void by reason of the Super-institution, and therefore no obstacle in the way to hinder the Presentation of *Rone*, and therefore *Rone* had good right: And if the Second Institution, be void, the Sentence cannot make it good, for the Ecclesiastical Court ought to take notice of the Common Law, which saith, That *Ecclesia est plena & consueta* upon the Institution, and the person hath thereby *Curam animarum*. And as *Doderidge* Justice said, He hath by it *Officium*, but *Beneficium* comes by the *Induction*; And although by the Ecclesiastical Law the Institution may be disannulled by Sentence, yet as *Lindw.* saith, *Alius est in Angl.* And *Doderidge* put a Case out of *Dr. & Student. lib. 2.* If a man Devise a Sum of Mony to be paid to *J. S.* when he comes to Full age, & he after sue for it in the Spiritual Court, they ought to take notice of the Time of Full age, as it is used by the Common Law, viz. 21, and not of the time of Full age as it is in the Civil Law, viz. 25. So in this case, for when those Two Laws meet together, the Common Law ought to be preferred: And when the Parson hath Institution, the Archdeacon ought to give him Induction. *Vid Dyer, 293. Beadingfield's Case, cited by Haugbron* to accord with this Case (u).

(u) Mich. 15.
Jac. B. R.
Renes Case
Poph. Rep.

(19.) By the Court, that if an Archdeacon make a general Mandate for the Induction of a Parson, viz. *Univers. personis, Vicariis, Clericis & Literatis infra Archidiaconat. meum ubicunque Constitut.* That if a Minister or a Preacher who is not resident within the Archdeaconry, makes the Induction, yet it is good. And the Opinion of four Doctors of the Civil Law was shewn in the Court accordingly, upon a Special Verdict (x).

(x) Chr. Deans
Case.
Noy's Rep.

(20.) In the Case of *Strange* against *Foot*, the sole point upon the Special Verdict was, If one *Prideaux* being Admitted and Instituted to a Prebendary, with the Cure, 4 *Eliz.* he being but 9 years of age; notwithstanding the Statute it is merely void. Note 4 *H. 6. 3.*

That

That if a Feme who is an Infant under 14 years hath issue, it is a Bastard (y).

(21.) It is said at the Common Law, that after *Induction*, the Admission and Institution ought not to be drawn into question in the Ecclesiastical Court; (z) for they say, That after *Induction* the Ecclesiastical Law may not call into question the *Institution*. That by *Induction* the Church is full against Common persons, but not against the King; and that by *Induction* the King may be put out of possession. (a) And in the Case between *Rowth* and the Bishop of *Chester*, it was Resolved, That after an *Induction*, an Institution is not to be examined in the Ecclesiastical Court, but by a *Quare Imp.* only: But yet the Justices, if they see cause, may write to the Bishop to Certifie concerning the Institution (b).

(y) Pafe. 2. Jc.
C. B. rot. 1320.
Strange ver.
Foot.
Noy's Rep.
(z) Mich. 12.
Jac. B. be-
tween Sir Tim.
Hutton and the
Bish. of Chester
(a) Hill. 15.
Jac. B. R.
Hitcham and
Glover's Cafe.
Roll. Rep.
(b) More's Rep.

(22.) Two Patrons pretended Title to Present; the one Presented, and the Bishop refused his Clerk: He sued in the *Audience* and had an Inhibition to the Bishop, and after he there obtained Institution and Induction by the Archbishop: Afterwards the Inferior Bishop Instituted and Inducted the Clerk of the other; for which Process issued out of the *Audience* against him; he upon that prayed a Prohibition, and a Prohibition was Awarded as to the Incumbency, because the Ecclesiastical Courts have not to meddle with Institution and Induction, (as was there said) for that would determine the Incumbency, which is triable at Common Law (c).

(c) Middleton
and Lawte's
Cafe.
More's Rep.

(23.) In a Prohibition prayed to the Ecclesiastical Court, the Case appeared to be this, viz. *Holt* was Presented, Instituted and Inducted to the Parish Church of *Storinton*: afterwards Dr. *Wickham* draws him into the Ecclesiastical Court, questioning of him for some matters, as touching the validity of his Induction, and upon this a Prohibition was by him prayed: *Williams* Justice, a Prohibition here in this Case ought to be granted, this being directly within the Statute 45 E. 3. cap. 3. for here the very Title of the Patronage comes in question, with the determination of which they ought not to intermeddle; also matter of *Induction*, and the validity thereof is determinable at the Common Law, and not in the Ecclesiastical Court, and therefore a Prohibition ought to be granted, and the whole Court agreed with him herein, and therefore by the Rule of the Court a Prohibition in this case was granted.

Trin. 9. Jac.
B. R. Holt's
Cafe, in
Bulstr. par. 13.

C H A P. XXV.

Of Avoidance and Next Avoidance 5

as also of Cession.

1. *What Avoidance is; how Twofold.*
2. *The difference in Law between Avoidance and next Avoidance.*
3. *How many ways Avoidance may happen; what Next Avoidance is: The word Avoidance falls under a double Acceptation in Law.*
4. *The Next Avoidance may not be granted by a Letter, it cannot be granted but by Deed.*
5. *Grant of a Next Avoidance by the Son, Leaving the Father Tenant in Tail, is void.*
6. *How Avoidance may be according to the Canon Law, which is other by Statute Law.*
7. *The Release of the Next Avoidance, made after the Church becomes void, is void.*
8. *A wide difference between the Common Law and the Canon, in respect of Plenarity and Voidance.*
9. *What Cession is; and who shall present in that case.*
10. *A Parson Beneficed accepting an Archdeaconry, falls not under this Cession.*
11. *In case of the Cession the Ordinary is to give Notice to the Patron; otherwise the Lapse doth not incur against him.*
12. *In what case the former Benefice is not void by Cession, notwithstanding the taking of another Incompatible, and without Dispensation; And in what case a Church void is held void as to all persons, except an Usurper.*
13. *In case of Three Grantees of the Next Avoidance, whether Two of them may Present, the Third being a Clerk.*
14. *What difference between an Avoidance by Parliament, and an Avoidance at the Ecclesiastical Law.*
15. *In what case an Advowson granted to a man, shall enure to him only for his life, and not go to his Executors.*
16. *A man having an Advowson in Fee of the Church, whereof himself is Incumbent, Deviseeth that his Executors should*
next:

next Present; Whether such Devise of the Next Avoidance be good.

17. A grant of a Next Avoidance to one is not after grantable by the same Grantor to another.
18. Whether the Creating of an Incumbent a Bishop in Ireland be a sufficient cause of Avoidance.
19. Where a Next Avoidance is granted to Two, whereof the one Releases to the other, that Other may after bring a Quare Impedit in his own Name.
20. If one Grantee of the Next Avoidance Present the other Grantee of the same Avoidance, whether such Grant be void or not?

(1.) **A**voidance is, when a Benefice or other Ecclesiastical living is void of a lawful Incumbent: which generally may be said to be Twofold; either in Fact and in deed, as when the Incumbent is dead, or actually deprived: or in Law, as when the same person or Parson hath more Benefices than one Incompatible, having no Dispensation, nor qualified for plurality. (a) Or an Avoidance is either *Temporal* or *Spiritual*: (1) *Temporal*, as by death of the Incumbent. (2) *Spiritual*, as by Resignation, Deprivation, Creation, Cession. The *Temporal* is an Avoidance *de facto*; the *Spiritual* is an Avoidance *de jure*. Of this latter or *Spiritual* Avoidance the Ecclesiastical Court takes cognizance and determines, and therefore the Supream Head may so dispence there, that such Avoidance in Law shall never come to be an Avoidance in Deed, and of this Avoidance in Law no Title accrues to the Patron, unless something be thereupon done by the Ecclesiastical Court, as a Declaratory Sentence, or such like. But upon Avoidance in Deed, Presentment accrueth to the Patron presently. Anciently when a Bishop was also the Parson of any Benefice, either in right of his Bishoprick, or that the Benefice was annexed to his See, for the Provision of his Table, or the better maintenance of Hospitality, the Fruits of such Benefice or Parsonage, during every vacancy or Avoidance of such Bishoprick, where the Bishop was both Lord of a Mannor, and Parson of a parsonage thereto annexed, did not come to the King (as they now do, whereby the Parsonage and Mannor are both consolidated into one, being now both holden to be Temporalities,) but the Parsonage came to the Archbishop of the Province, as a Spirituality granted to his See by Priviledge, during the vacancy of the Sees of such Bishops as were in his Province, as may appear by the Records of the Lord Archbishop of Canterbury. *Ex Registro Archiepisc. Cant. & Ridl. View, cap. 6. Sect. 1.*

(a) Bro. tit.
Quare Imp.
nu. 51.

(2.) There is in operation of Law a wide difference between *Avoidance* and *Next Avoidance*; the former is *in esse*, the other is only in *posse*; the former is the want of an Incumbent upon a Benefice *de presenti*: the other is the grant of a supply of that want *de futuro*, and is the grant of a *Next Avoidance* in a Parsonage or other Spiritual promotion, which is grantable whiles there is an Incumbent actually in being, and is in the nature of a thing in Action, and therefore will not pass without Deed. But a present *Avoidance*, though it be not merely a thing in Action, yet it is not Grantable in that kind as the other: The present *Avoidance* is not valuable, and therefore shall not be Assets; it may be otherwise with a *Next Avoidance* in some Cases, for the *Next Avoidance* is but a Chattel, (b) the Grant whereof is not good without Deed. (c) For an Advowson or the Patron's Right of Presentation to a Church, is not a Spiritual, but a Temporal Inheritance, grantable by Deed, and (if Appendant) as the Mannor it self to which it is Appendant, as an Accessory to its principal.

(3.) The cognizance of *Voidance* of Benefices is Ecclesiastical by the Statute 25 E. 3. cap. 8. it being the want of an Incumbent on a Benefice (as aforesaid) and is opposed to *Plenary*. This *Voidance* may be either by Death, Deprivation, Law or Act of Parliament, Cession or Plurality, *Resignation*, Creation, Incapacity, Union, Non-payment of Tithes, &c. So that a *Voidance* may happen to be such either in Law, or in Deed; virtually, or actually. *Resignation* is *Furis propriis spontanea Resignatio*, or the voluntary yielding up of the Incumbent (into the hands of the Ordinary) his interest and right, which he hath in his Benefice. Touching the Form of *Resignation*, and Protestation, which must be when the party will *Resign* *vid. Regist. fo. 302. F.N.B. fo. 273.* and this *Resignation*, which is one of the causes of *Avoidance*, is to be made to the Ordinary, for it is a Rule in the Canon Law; *Apud eum debet fieri Renunciatio, apud quem pertinere dignoscitur Confirmatio.* The *Next Avoidance* is only a power legally granted to another by the Right Patron to present a Clerk to the Church, when it shall next become void. (d) And during such *Voidance* of a Parsonage, Franktenement of the Glebe thereof is said to be in no man, but is said to be in *Abeyance*, that is, only in the remembrance, intentment, and consideration of the Law, that though for the present, during the time of such Vacancy, it be not actually in any person, yet it is (by way of *Abeyance*) in hope and expectation belonging to such one as shall next enjoy the same. The word *Avoidance* hath Two significations in the Law; the one (and that here intended) is when a Benefice or any Ecclesiastical Living becomes *Void* of an Incumbent; the other may be that, which is understood by what we intend in Plead-

ings

(b) Pasch. 28.
El. C.B. Tardly
verf. Pefcau.
Owen Rep.
(c) Mich: 31.
& 32 Eliz.
Cripps Cafe.
Rep. ibid.

(d) Bro. tit.
Quare Imp.
nu. 51.

ings in *Chancery*, when we say *Confessed* or *Avoided*, *Traversed* or *Denied*, &c. which hath no relation to the matter in hand. Likewise after the death of a Bishop, or Parson, the Freehold is in *Abejance* of necessity (e); but the Law will not admit the Framing of *Abejances* needless and in vain, as in Vacations of Bishops, Parsons, or the like, as in case of Single Coporations, Bishops, Deans and Parsons, which must die, and leave a *Vacuum* of the Freehold (f). And this *Next Avoidance* is a Chattel local, where the Advowson is, not where the Deed is; for it was resolved in the Case of *Holland* vers. *Shelley*, That the Advowson had such a Locality in the Rape, where the Church was, that it accrued to the Plaintiff, wheresoever the Deed of Grant, or the Grantee himself was (g).
(e) Colt and Glover's Case. vers. Bishop of Cov. & Litchf. Hob. Rep. (f) 13 Jac. in Scaccar. Rot. 96. Sheffield vers. Ratcliff. Hob. Rep. (g) Mich. 17 Jac. C. B. Rot. 2710. Holland vers. Shelley. Hob. Rep.

(4.) C. brought a *Quare Impedit* against the Archbishop of *Canterbury* and others, and declared upon a Grant of the *Next Avoidance*, and the Defendant demanded *Oyer* of the Deed; and the Plaintiff shewed a *Letter*, which was written to his Father by the true Patron, by which he had Writ to his Father, that he had given to his Son, that was the Plaintiff, the *Next Avoidance*; and upon this there was a Demurrer: And the whole Court for the Demurrer, For that such *Letter* was a Mockery, for the Grant was not good without Deed: and Judgment was given accordingly (i). But by Deed it is Grantable, whereby Advowsons are also Grantable, as other Inheritances are, and the delivery of the Deed of Grant of it shall be instead of Livery made of the Church it self, according to Sir *Edward Coke*, in the first Part of his Institutes (k).
(i) Mich. 11 & 32 Eliz. C. B. Cripps vers. the Archb. of Cant. and others. Owen. Rep. (k) Co. 1. par. Inst. 46. & 335.

(5.) If a Tenant in tail and his Son joyn in a Grant of the *Next Avoidance*, it is void against the Son, and no Confirmation for in the case of a *Quare Impedit* brought by Sir *Marmaduke Wivel*, the Point was this: Tenant in tail of an Advowson, and his Son and Heir joyned in a Grant of the *Next Avoidance*. The Tenant in tail died; and it was Adjudged, that the Grant was utterly void against the Son and heir that joyned in the Grant, because he had nothing in the Advowson, neither in possession or right, nor in actual possibility at the time of the Grant.

(6.) The Acceptance of an Archdeaconry by one who hath a Benefice with Cure of Souls, may work an *Avoidance* at the Canon Law as to such Archdeaconry; yet an Archdeaconry, and the Promotion thereof, as being not any Cure of Souls, though an Ecclesiastical Preferment, seems not to be within the Statute of 21 H. 8. 13. And the Opinion of *Wray* Chief Justice

† Sir Marmad. Wivel's Case. Hob. Rep.

in *Underhill's Case* upon that Statute was, that he conceived the Law there to be qualified in that case, by reason of a *Proviso* in the said Statute, *viz.* Provided, that no Deanry, Archdeaconry, &c. be taken or comprehended under the name of a Benefice having Cure of Souls, in any Article above specified (1).

(1) Pasch. 3.
Eliz. B. R. *Underhill's Case*.
Leon. Rep.

(7.) In a *Quare Impedit* the Case was, The Plaintiff counted, that R. B. was seized of an Advowson, and granted the *Next Avoidance* to the Plaintiff and H. B. and that afterwards the Church became void, and after during the *Avoidance* H. B. released to the Plaintiff, and so that it belongs to him to Present. Upon this Count the Defendant did demur in Law; for it appears upon the Plaintiffs own shewing, that H. B. ought to have joyned with the Plaintiff in the Action, for the Release being made after the Church became void, is not of any effect, but utterly void. So is the Grant of the Presentment to the Church where the Church is void, for it is a thing in Action: *Vid.* the Lord Dyer, 28 H. 6. 26. 3 M. Dyer 1291 11 Eliz. Dyer. 283. And afterwards Judgment was given, that the Release was void (m).

(m) Mich. 30.
& 31 El. C.B.
Case *Brookesby*
against *Wickham* and the
Bishop of
Lincoln.

(8.) Touching *Avoidances* there is a wide difference between the Judgment of the Common Law, and that of the Canon: for if a meer Lay-man, not having holy Orders, be Presented to a Benefice, the Church remains void according to the Canon Law, notwithstanding such Presentation; but at the Common Law, albeit this be a meer nullity there also, and void, yet it doth Adjudge the Church to be Full according to the publick Admission, Institution, and Induction, and not according to the capacity of the person, which is a thing secret, until such an one be deprived for it by Sentence in the Spiritual Court; and so the Church in construction of Law (understand it of the Common Law) is held void but from the time of Deprivation, of which notice ought to be given to the Patron. (n) So that according to the Canon Law there cannot be a Plenary by the Presentation, Admission, Institution and Induction, of a meer Lay-man to a Church; it is otherwise at the Common Law, which doth not so much consider the Capacity or incapacity of the person Instituted and Inducted, as the Institution and Induction it self, until such time as there is a Sentence of Deprivation in the Ecclesiastical Court.

(n) Hill. 35.
Eliz. B. R.
Popl. Rep.

(9.) *Cession* is when an Ecclesiastical person Beneficed is Created a Bishop: or when the Parson of a Parsonage taketh another Benefice without Dispensation, not being otherwise qualified for Plurality: In both which cases their first Benefices become void, and are said to be so void by *Cession*; inasmuch that the King shall Present *pro hac vice* (whoever be a Patron) to that Benefice, which he had who was Created Bishop; and in the other Case the Patron may

may Present. (o) So that if a Parson or Dean in *England* take and accept of a Bishoprick in *Ireland*, it will cause that the first Church shall become void by *Cession*. (p) Resolved in *Holland's Case*, and in *Digby's Case*, 4. *Rep.* That the Patron may Present, as soon as the Incumbent is Instituted in a Second Living, without Deprivation.

(10.) By the Council of *Lateran* it was ordained, That whoever having a Benefice with Cure of Souls, should accept of another *cum Cura*, should *ipso jure* be deprived of the Former, the Patron whereof might Present as to a Benefice void; (q) and this without any Sentence Declaratory of the first Church being void, if there were no License or Dispensation to the contrary in the case, (r) to prevent a Cession of the former Benefice. For it hath been Resolved, That the Acceptance of a Second Benefice voids the former by *Cession*; without any Sentence Declaratory by the Statute of 21 *H. 8.* 13. but if having a Benefice *cum Cura* he Accept of an Archdeaconry, the same is not such a Benefice with Cure of Souls within the said Statute, as to make the former void, as was then also Resolved. (s)

(11.) In case of *Cession* in this kind, it is requisite that Notice thereof be given by the Ordinary to the Patron, otherwise the Lapse will not incur against him, in case he present not within the Six months. (t) Nor do the Courts at Common Law take notice of such *Cession*, until the same be certified unto them by the Ordinary. And wherever an Ecclesiastical Dignity and a Benefice with Cure are Incompatible, there the Acceptance of the one will be a *Cession* of the other: For which reason if the Incumbent of a Parsonage or Vicarage with Cure, be made Dean of a Cathedral, his Parsonage or Vicarage becomes void by *Cession*, (u) unless he be qualified for Plurality: Or if a Dean be made a Bishop, yea, though a Dean or Parson in *England* be made a Bishop in *Ireland* (as aforesaid) his Benefice becomes void, as was Resolved in *Evans* and *Askwith's Case*; for that the Constitution or Council, which makes it void, is general, and not limited to any place. And so it was also resolved; 3 *E. 3.* *Fitz. Trial*, and so adjudged; 21 *Jac. C. B.* in the Case between *Woodly* and the Bishop of *Exon* and *Manwaring*. (x)

(12.) The case may so happen, that albeit a man having a Benefice with Cure of Souls accept another, and be Instituted and Inducted into the same; yet his first Benefice shall not be void by *Cession*, though the Benefices be incompatible, though there be no Dispensation in the case, and although himself be not otherwise qualified for Pluralities: For it hath been Resolved, That if a man having one Benefice, accept another, and be Instituted and Inducted into

(o) *Terms of Law verb. Cession.*
(p) *Latch. Rep. fo. 234.*

(q) *Conc. Lat. An. 1215.*
Innoc. 3. *Pap.*
(r) 24 *E. 3.* 39.
& 24 *E. 3.* 26.
b. acc. & F.
N. B. 34.

(s) *Pasch. 31. Eliz. B. R.*
Underbil and Savage's Case.
Leon. 1. *Rep.* 316.
(t) *Co. 4. par. 77. in Holland's Case.*

(u) 5 *Ed. 3.* 9.
Quas. Imp. 35.
24 *E. 3.* 38.
Parl. Law.
c. 16.

(x) *Trin. 31. Car. B. R.*
Evans and Kiffin ver. Askwith.
Jones Rep.

(y) Dy. on St.
13 Eliz. the
last Case
vouch'd, in
Case *Stukely*
vers. *Butley*.
Hob. Rep.

(z) Trin. 4.
Car. Rot. 441.
the King vers.
George Archb.
of Cant. and
The. Pryst.
Cro. Rep.

(a) D. 13, 14.
Eliz. 304. 54.
Rol. Abr. ver.
Presentment,
lit. M.

into the Second, and then read not his Articles; That yet the First Benefice voids not by *Cession*, because the Second is not taken. (y) Notwithstanding, it cannot be denied, but that where a man having a Benefice with Cure of Souls; above the value of Eight pounds *per Ann.* doth take another with Cure, and is there-to Admitted, Instituted and Inducted, the First Benefice (without Dispensation) becomes void; as in the Case of the King against George Lord Archbishop of Canterbury: In which Case it was held, That the Church was absolutely void *in facto & jure* by taking of a Second Benefice, and that by the express words of the Statute of 21 H. 8. So that by the Acceptance of a Second Benefice the Church is void *facto & jure*, *quoad* the Patron and all others. (z) *Sed Q.* whether void as to an Usurper; for in some cases a Benefice may be void as to some persons, and not void as to others: As in the Case of *Simony*, whereby as well as by *Cession* a Church becomes void; yet in that Case, although it be void to all men *quorum interest*, to the King and his Incumbent, and all that claim under him, and to the Parishioners, to the Ordinary, and to the like, yet (according to Sir Hen. Hobart Chief Justice) it is not void to an Usurper; for a man without Right cannot Present unto it as unto a Church void, nor the Ordinary so discharge himself, if he receive the Clerk of an Usurper; for he is none of them *quorum interest*. *Pasch. 14. Jac. Rot. 1026.* Case of *Winchcomb* against the Bishop of Winchester and Rich. Puleston, Hob. Rep.

(13.) If the *Next Avoidance* be granted to three persons, and after, the Church become void, and then Two of the Three Present, the Third Grantee, being a Clerk; in this Case the Presentation is good, and the Bishop may not refuse him, inasmuch as all Three were Joynt-tenants thereof by the Grant, and only Two of them joynt in the Presentment, for that the Third person cannot Present himself; but if only one of these Three Grantees Present the Third, the Bishop hath power to refuse him (a). And if an Incumbent having the Advowson, do Devise the *Next Avoidance*, it seems it is good. *Trin. 13 Jac. B. R. Harris vers. Austen Rol. Rep.*

(14.) In *Hollands* Case it was Resolved, That before the Statute of 21 H. 8. c. 13. if he which had a Benefice with Cure, accept another with Cure, the First was void; but this was no *Avoidance* by the Common Law, but by Constitution of the Pope, of which the Patron might take Notice if he would, and Present, without Deprivation: But because the *Avoidance* accrued by the Ecclesiastical Law, no Lapse incurred without Notice, as upon a Deprivation or Resignation; so that the Church was void for the

the Benefit of the Patron, not for his disadvantage: But now if the First Benefice be of the value of Eight pounds *per annum*, the Patron at his peril ought to Present, for to an *Avoidance* by Parliament every one is party; but if not of Eight pounds, it is void by the Ecclesiastical Law, of which he need not take Notice (b).

(15.) In a *Quare Impedit* The defendant said *A.* was seized of the Advowson of the Church of *D.* and by Deed 19 *Fac.* granted to *J. S.* the *Next Avoidance*, and that *J. S.* died, and made his Executor, who Presented the Plaintiff to the Church being void. Upon *Non concessit* it was found, That *A.* granted to *J. S.* *durante vita ipsius J. S. primam & proximam Advocationem*, and that he died before the Church became void. Whether this was an absolute Grant of the *Next Avoidance*, as is pretended, was the Question. And Resolved, it was not; but it is limited to him to Present to the Advowson if it becomes void during his life, and not that otherwise it should go to his Executors; and therefore it was Adjudged against the Defendant (c).

(16.) The Incumbent of a Church purchased the Advowson thereof in Fee, and devised that his Executor should Present after his decease, and devised the Inheritance to another in Fee. It was said, the devise of the *Next Avoidance* was void, because when his Will should take effect, the Church was instantly void. But the Court held the devise was good, for the Law is so, and it shall be good; according to the intent of the party expressed in his Will. (d) The Grant of the *Next Avoidance* during the Avoidance, is void in Law. *Stephens* and *Clark's Case* *More's Reports*.

(17.) In a *Quare Impedit* the Case was, The Corporation of *B.* being seized of an Advowson, granted the *Next Avoidance* to *J. S.* and afterwards granted *primam & proximam Advocationem* to the Earl of *B.* who granted it to the Plaintiff: The Church became void, *J. S.* Presented his Clerk, who was Inducted, and then the Church became void again. It was Resolved, that the Second grant was void, so as the Plaintiff had no Title, for when he had granted *primam & proximam Advocationem* to one, he had not Authority to grant it after to another; but if the First Grant had been lost, so as it could not have been pleaded, there perhaps the Second Grant had been good (e).

(18.) In a *Quare Impedit* the Case was, *H.* being Incumbent of a Church, was Created a Bishop in *Ireland*, and the Queen Presented the Defendant. It was the Opinion of the Justices, That this Creating of the Incumbent a Bishop in *Ireland* was a good cause of *Avoidance*, and that the Queen should have it by her Prerogative: But if

(b) Co. 4. HbL.
landr. Case.
39 Eliz.

(c) Trin. 14.
Car. B. R.
Mann and
the Bishop of
Bristol and o-
thers.
Cro. par. 3.

(d) Pynchin
and Dr. Harris.
Cro. par. 2.

(e) Williams
and the B. of
Lincoln's Case.
Cro. par. 1.

(f) Mich. 42.
& 43 Eliz. B.
R. Sir R. Bos-
set and Geels
Case.

Cro. par. 1.

(g) *Benet* and
the Bishop of
Norwich's Case.

Cro. par. 1.

(h) *Lewis* and
Benet's Case.
More's Rep.

(i) Sir Godfr.
Foliam's Case.
More's Rep.

if the Queen doth not take the benefit of the First Avoidance, but suffers a Stranger to Present, and the Presentee dies, she may not have Prerogative to Present to the Second Avoidance (f).

(19.) The Next Avoidance of a Church was granted to *A.* and *B.* *A.* releases to *B.* and after the Church became void: It was Adjudged in this Case, that *B.* may Present, and upon Disturbance have a *Quare Impedit* in his own Name (g). Or thus: The Next Avoidance was granted to Two, the one Released to the other, who brought a *Quare Impedit* in his own Name; and it was adjudged maintainable, because it was before the Church was void (h).

(20.) *A.* seized of the Mannor of *D.* to which an Advowson was Appendant, granted the Next Avoidance to *B.* and *D.* & eorum *enilibet conjunctim & divisim Hæred. Executor. & Assignatis suis.* The Church void, *B.* Presents *D.* to the Church: Adjudged, that the Presentment of him was good, though he were one of the Grantees (i).

C H A P. XXVI.

Of Pluralities.

1. *Pluralities condemned by the Council of Lateran ; yet dispenc'd with by Kings and Popes.*
2. *What in this matter the Pope anciently exercised by way of Usurpation, the King may now do de jure; The difference between them and the manner how.*
3. *What Parsons are qualified for granting or receiving Pluralities.*
4. *Several Laws relating to Pluralities, Dispensations, and Qualifications.*
5. *How the 8l. annual value of a Benefice shall be understood, whether as in the Kings Books, or according to the true value of the Benefice.*
6. *The Lord Hobart's Opinion touching the Statute of 21 H. 8. relating to Pluralities.*
7. *What the Pope's Power in England was before the making of the said Statute; And whether the taking of a Bishoprick in Ireland by a Dean in England, makes the Deanry void by Cession.*
8. *The Chaplains of Persons of Honour, having divers Benefices, shall retain them for their Lives, though they be discharged of their Service.*
9. *Whether the Ecclesiastical Court may take cognizance of Plenary or Voidance, after Induction; and whether the cognizance of Cession or no Cession, belongs to the Temporal or Spiritual Court.*
10. *Difference between Voidance by Act of Parliament, and Voidance by Ecclesiastical Law.*
11. *A Prohibition granted upon Sequestration of a Benefice by the Bishop.*
12. *The Fifth Paragraph aforesaid Adjudged and determined.*
13. *How the Voidance in case of Three Benefices in one person.*
14. *Benefice not void, if the King License the Incumbent to be an Incumbent and a Bishop.*
15. *How the taking of a Second Benefice is a Voidance of the First.*
16. *Whether so, in Case of a Chaplain of the King.*

C c c

17. *Whether*

17. *Whether so, in case of a Si modo or Modo sit, by way of a Limitation in the Dispensation.*
18. *Whether the word Dispensamus be necessary in the Letters of Dispensation for a Plurality?*
19. *The King Retainer of a Chaplain by Word only qualifies him for a Plurality within the Statute of 21 H. 8.*
20. *Whether a Third Chaplain retained by a Countess Widow, is qualified to purchase a Dispensation for Plurality.*
21. *In reference to Plurality, whether regard is to be had to the value mentioned in the Statute of 25 H. 8. or to the true value of the Benefice.*
22. *Whether Admission and Institution makes the First Benefice void without Induction.*
23. *Whether before the Statute of 25 H. 8. the Pope might have granted Dispensation for Pluralities.*
24. *Whether the Retainer of a Chaplain may be good and sufficient without a Patent.*
25. *In what case a Dispensation for Plurality may come too late, Though before Induction.*
26. *Three Resolutions of Law to reference in Avoidance by reason of Plurality.*

(1). **P**lurality, according to the Common acceptance of the word, is where one and the same person is possessed of Two or more Ecclesiastical Benefices with the Cure of Souls, *simul & semel*. It was long since condemned by the general Council of *Lateran*, (a) whereby it was Ordained, That, whatever Ecclesiastical person, having one Benefice with Cure of Souls, doth take another such, shall *ipso jure* be deprived of the former; and if he contest for the retaining thereof, shall lose both. (b) Notwithstanding which Canon, it was heretofore usual with the Pope to usurp a power of Dispensation in this matter, the which *de jure* was anciently practiced by Kings, as Supreme, and as the Original Donors of Benefices and Ecclesiastical Dignities; witness *Edmond* that Monk of *Bury*, who by virtue of such Dispensations held several Ecclesiastical Benefices at one and the same time. The said Canon (as to the substance thereof, relating to *Pluralities*) is now Confirmed by the Statute of 21 H. 8. 13. which limits the former Benefice with Cure of Souls to the yearly value of Eight pounds or upwards, and the time of Avoidance thereof to be immediately after possession, by Induction into the other with Cure of Souls; with

(a) An. 1215.

(b) Concil.

Later. To. 4.

221. cap. 29.

24 E. 3. 33.

39 E. 3. 44.

F. N. B. 34. L.

Co. 4. par. 75.

with power of Pretentation *de novo* granted to the Patron of the former Benefice, and all benefit of the same to the Presentee, as if the Incumbent had died or resigned. *Quare* whether the said yearly value of Eight pounds or above, ought to be computed according to the valuation in the Kings Books, as returned into the Exchequer, and now used in the First-Fruits Office, or according to the just and true value of the Benefice. (c) *Q.* likewise, Whether a Parson of a Church Improprite, with a Vicar perpetually endowed, accepting of a Presentation unto the Vicarage without Dispensation; be a *Pluralist* within the Canon and Statute aforesaid? The Negative is supposed to give the best Solution to the Question (d).

(c) Dyer 232.
p. 29.

Cro. Eliz. 853.

(d) Vid. *Parf. Law* cap. 21.

(2.) The same power of granting Faculties, Pluralities, Commendams, &c. which anciently the Pope exercised in this Realm by Usurpation, is by the Statute of 21 H. 8. cap. 13. and 1 Eliz. transferr'd unto and vested in the Crown *de jure*; also from and under the King, in the Archbishop of Canterbury and his Commissaries by Authority derived from the Crown: The Pope anciently granted to Bishops after Consecration, Dispensations *Recipere & obtinere Beneficium cum cura animarum*, to hold the same in Commendam, the which he did in this Realm by Usurpation, and which the Crown may now do *de jure*; for the same power (as aforesaid) which the Pope had, is by the Acts of Parliament in 25 H. 8. & 1 Eliz. in the King *de jure*. But there is a very material difference between the Dispensations anciently here granted by the Popes, and those at this day by the King and Archbishop, Confirmed by the Kings Letters Patents, which are not good otherwise than to such as are Compleat Incumbents at the time of granting thereof, whereas it was sometimes otherwise with the other; whence it is observable, that in Digbie's Case the Dispensation came too late: A. is Instituted and Inducted into a Benefice with Cure, value Eight pounds *per annum*. Afterwards the King presenting him to another with Cure, he is Admitted and Instituted: Afterwards the Archbishop of Canterbury grants him Letters of Dispensation to hold Two Benefices; the King Confirms the same: Afterwards he is Inducted into the Second Benefice. In this case the Dispensation comes too late, because by the Institution into the Second Benefice the First Benefice was void by the Stat. of 21 H. 8. (e).

Ibid.

(3.) The Acceptance of a Second Benefice, with a Dispensation, comes not under the notion of prohibited Pluralities, in case the First were under the annual value of Eight pounds, or *sine cura*. And what persons are qualified either for the granting or receiving Pluralities, appears by the Stat of 21 H. 8. c. 13. In which

(e) Co. 4. par. 79.

Digbie's Case.

there is not any limitation of Number of Chaplains to be retained by the King, Queen, and Prince, and other the King's Children; for which reason they may retain as many Chaplains as they please, and each of them qualifiable by a Dispensation for *Plurality*: But if either of the Kings Chaplains be Sworn of his Majesties most Honourable Privy Council, such may purchase a Dispensation to hold Three Benefices with Cure of Souls. The Persons specially qualified by Dispensation for *Pluralities*, are either (1) Such as are retained as Chaplains to Persons of Honour; Or (2) Such as are qualified thereto in respect of their *Birth*: Or (3) Such as are dignified with some certain *Degrees* in either of the Universities of

In the Parsons Counsellor, par. 1. chap. 4.

	Chaplains.
Archbishop	8
Duke	6
Marquess	5
Earl	5
Bishop	6
Viscount	4
Lord Chancellor	3
Knight of the Garter	3
Baron	3
Duchess,	} Widows, }
Marchioness,	
Countess,	} each }
Baroness,	
Treasurer,	} of the Kings House, }
Controller,	
Kings Secretary	2
<i>Stat. 21. H. 8. cap. 13.</i>	
Kings Almer,	} each }
Clerk of the Closet,	
Master of the Rolls,	} each }
Chief Justice B. R.	
Warden of the Cinque Ports	1

this Kingdom. In reference to the first of these, every Archbishop and Duke may have Six Chaplains; Marquess and Earl, Five; every Viscount and other Bishop, Four; Lord Chancellor, Three; Knight of the Garter, Three; Baron, Three; Duchesses, Marchioness, Countess, and Baroness (being Widows) Two; Treasurer and Controller of the Kings House, Two; the Kings Secretary and Dean of his Chappel, the Kings Almoner and Master of the Rolls, Two; the Chief Justices of the Kings Bench, and Warden of the Cinque Ports, One.

In reference to the Second qualification, viz. By *Birth*, the Brothers and Sons of all Temporal Lords, and of Knights, born in Wedlock, may purchase Dispensations to hold two Parsonages, &c. with Cure of Soul. In reference to the Third, all Doctors and Bachelors of Divinity, Doctors and Bachelors of Law, Presented to any of these De-

grees, not by Grace only, but by any of the Universities of this Realm, may purchase and hold as aforesaid. *Vid.* Statute 21 H. 8. cap. 13.

(4.) Although by the Letter of which Act the First Living is not void until Induction into the Second, the words being [*If the party be instituted and Inducted in possession of the Second Living, that then the first shall be void.*] yet to avoid the great inconveniency

Par. 1. chap. 4. (as Sir Simon Degge observes in his *Parsons Counsellor*) that otherwise would ensue, it has been held, That the First Living is void upon the bare Institution into the Second, and so it should seem the Law.

Law was before the making of this Act, where the party had no Dispensation. The sufficiency of qualification for *Plurality* relates as well to the Dispensation as to the Parson; for if the Dispensation after its being had from the Master of the Faculties, be not confirmed under the Great Seal of *England*, other qualifications will not suffice. Nor are the supernumerary Chaplains of any person of Honour, retained by him above the Number allowed by the Statute, qualified for *Plurality*. Co. 4. 90. B. *versus* the Bishop of Gloucester and Saveacre. Andrews. More, 561. The death, attainder, degradation or displacing of a Chaplains Lord, or his discharging his Chaplain, unqualifies him for a Plurality of incompatible Livings; (i) otherwise of the Chaplain of a Dukes Marchioness, Countess, or Baroness in case of After-marriage. (k) A double Capacity in one and the same person of Honour to qualify his Chaplains, doth but capacitate him to qualify his number of Chaplains only according to his qualification. (l) A Person of Honour having retained his full Number of Chaplains, and discharging them after their preferment, may not during their Lives qualify others (m).

(i) Co. 4. 17. b.

(k) Id. 4. 118.

(l) Ibid.

(m) Co. 4. 90. a.

(5.) The Question was formerly put, Whether the 8l. yearly value, mentioned in the Statute of 21 H. 8. c. 13. shall be understood according to the taxed value in the Kings Books, or according to the very true value of the Benefice? Mr. Hughes in his *Parsons Law* reports a Case in King *Jame's* time, wherein this question was debated *pro & con*, the Judges equally divided, the Case for difficulty and variance of Opinion adjourned, and afterwards (as he there speaks *de auditu*) by order of the King compounded. (n) In that Case Two Presidents it seems were shewed in proof of that Opinion, which inclined to have it taken according to the very value of the Benefice; (o) notwithstanding when the same point came again several years after into question, the Court then seemed to incline against the Opinion, which was for the very value of the Benefice: But (says he) the Case was not then resolved or adjudged, but remaineth a Question undetermined. (p) *Quare* the Law. *Foster* and *Walmisley* Justices held the value should be taken according to the Taxed value, as in the Book of First-Fruits: but *Warburton* and *Coke* Chief Justice, *Contra*. It hath been resolved in *Holland's Case*, and likewise in *Digby's Case*, Rep. 4. and often before since the Council of *Lateran*, An. Do. 1215. That if a man have a Benefice with Cure, whatever the value be, and is Admitted and Instituted into another Benefice with Cure, of what value soever, having no Qualification or Dispensation, the First Benefice is *ipso facto* so void, that the Patron may present another to it, if he will. But if the Patron will not Present, then if under the value, no *Lapse* shall incur

(n) Pasf. 8. Jac. C. B. the King of Bristol and Hanleigh's Case: vid. Hughes's Parf. Law, cap. 18.

(o) 40 El. C. B. Bush & Smith's Case. & Trin. 43 El. B. R. 101. 164. Round Case. Cro. par. 3. p. 358.

(p) Vid. *parf. Law* ubi sup. Under *Pepe* Innocent. 3.

(q) *Shute* verſ.
Higden.
 Vaugh. Rep.
 vid. *Anderſ.* 1.
 pa. f. 200. b.
 p. 236. vide
Moor's Rep.
 Caſ. Larg. ad
 eund. effect.

incur until *Deprivation* of the firſt Benefice, and Notice. But if of the value of *eight pounds*, or above, the Patron at his Peril muſt Preſent within Six months by the Statute of 21 H. 8. (q). And in that Caſe of *Digby* it was adjudged. That when a man hath a Benefice with Cure above *Eight pounds*, and afterwards taketh another with Cure, and is Preſented and Inſtituted, and before Induction procures the Letters of Diſpenſation, that this Diſpenſation comes too late. For by the Inſtitution *Eccleſia plena & conſulta exiſtit* againſt all perſons except the King; for every Rectory conſiſteth upon Spirituality and Temporality. And as to the Spirituality viz. *Cura animarum*, he is compleat Parſon by the Inſtitution; for when the Biſhop upon Examination had, admitteth him able, then he doth Inſtitute him, and ſaith *Inſtituo te ad tale Beneficium, & habere curam animarum* of ſuch a Pariſh, & *accipe curam tuam, &c.* Vide 33 H. 6. 13. But touching the Temporalities, as the Glebe-Lands, &c. he hath no Freehold in them until Induction: for by the General Council of *Lateran*, Anno. Dom. 1215. it appeareth, That by the acceptance of two Benefices the firſt is void, *Aperto jure*; for upon this Council are the Books of the Common Law in this Caſe founded. And it was in this Caſe reſolved, That this was an Acceptance of a Benefice *cum Cura* within the Statute of 21 H. 8. Inſtitution is an Acceptance by the Common Law (r).

(r) Co. 4. *Digby's* Caſe.
 41 Eliz. f. 78.

A man was Preſented to a Church with a Vicarage endowed, the Parſon accepted of a Preſentation to the Vicarage without diſpenſation: Whether this were a Plurality by the Canon Law, and by the Statute of 21 H. 8. was the Queſtion. *Hobart* Chief Juſtice was of Opinion, That notwithstanding they were ſeveral Advowſons, and ſeveral *Quare Impedits* might be brought of them, and ſeveral Actions maintained for their ſeveral Poſſeſſions, yet the Preſentment of one man to the Parſonage and Vicarage was no Plurality, becauſe the Parſonage and Vicarage are but one Cure: And there is a Proviſo in the Statute, That no Parſonage that hath a Vicar endowed, ſhall be taken by the Name of a Benefice with Cure within the Statute, as to make it a Plurality (s).

(s) Mich. 22.
 Jac. B. R.
Woodley and
 the Biſhop of
Exeter and
Manwaring's
 Caſe. Cro.
 par. 2.

(6.) The Lord *Hobart* in *Colt and Glover's* Caſe againſt the Biſhop of *Coventry* and *Lichfield* is clear of Opinion; That Biſhopricks are not within the Law under the word [*Benefices*] in the Statute of 21 H. 8. cap. 13. So that if a Parſon take a Biſhoprick, it avoids not the Benefice by force of this Law, but by the ancient Common Law, as it is holden 11 H. 4. 60. But withal he holds it as clear, That if a Biſhop have or take two Benefices, Parſonages, or Vicarages, with Cure, either by retainer, or otherwiſe *de novo*, he

he is directly as to those Benefices within the Law; for he is to all purposes for those not a Bishop (whether it be in his own Diocese or not) but a Parson or Vicar; and by that Name must sue and be sued, and Prescribe and Claim. For if any person, having one Benefice with Cure, &c. take another, &c. whosoever will hold two Benefices, must have such a Qualification, and such a Dispensation, as the Law 21 H. 8. requires: Whereupon the Lord *Hobart* in the aforesaid Case is clear of Opinion, That if a man be qualified Chaplain to any Subject, and then be made a Bishop, his Qualification is void, so as he cannot take Two Benefices *de novo* after by force of that Qualification: But if he had lawfully two Benefices before his Bishoprick, he may by dispensation of Retainer (besides his former dispensation, to take two Benefices) hold them with his Bishoprick. And if a man, being the Kings Chaplain, take a Bishoprick, he holds that he ceaseth to be the Kings Chaplain; and Bishops are not in that respect Chaplains to the King, within the meaning of the Statute: So that the Clause of the Statute that gives the King power to give as many Benefices as he will of his own gift, to his Chaplain, will not serve them. (q) (q) Mich. 10.. In this Case of *Colt*, &c. against the Bishop of, &c. he is of Opinion, That if a man have a Benefice with Cure worth above 8 l. *Colt* and *Gla.* he cannot without Qualification and Dispensation procure another ver. vers. Bishop of Coven. try & *Lichfield*. with Cure, to be united to it after, though they make but one Benefice; for this Cautel of Union is provided for by Name: But of Unions before, he is of another Opinion; Case *Colt*, *Hob.* Rep.

(7.) In ancient times the Pope used to grant Dispensations of the Canons in this Realm, and so might the King have done. The first Statute that restrain'd the power of the Pope was that of 21 H. 8. of *Pluralities*: That the Church shall be void notwithstanding any Grant of the Pope: Also the power of the Pope was taken away by the Statute of 25 H. 8. Before that of the 21 H. 8. the Pope might have dispensed with a man to have 20 Benefices; and so might the King. The 21 H. 8. was the first Statute, or Law, which gave allowance for *Pluralities*; afterwards by the 28 H. 8. the power of the Pope was given to the King: But as it was said and agreed in the Case of *Evans* and *Ascough*, that was not by way of *Introduction*, but *Cumulative* and by way of *Exposition*. And by that Statute the Archbishop of *Canterbury* had in this matter a concurrent power with the King, and Dispensation granted by the King, or by the Archbishop, is good. (r) Also in the said Case (r) Hill. 22. Jac. B. R. rot. it was agreed by all the Justices, That if a Parson or Dean in *England* doth take a Bishoprick in *Ireland*, it makes the first Church ver. 1164. *Evans* void by Cession; because *Ireland* is a Subordinate Realm to *England*. ver. *Ascough*. Latch. Rep.

land, and governed by the same Law: For it was there agreed by all as well by the Justices as those of the Bar, That if a *Parson* or *Dean* in *England* take a *Bishoprick* in *England*, the first Church is void by *Cession*. Justice *Whitlock* gave this reason for it, Because there is but one *Canon Law per totam Ecclesiam*; and therefore wherever the Authority of the Pope extended it self, be it in one or divers Realms, the taking of a *Bishoprick* made the *Deanry* or *Parsonage* void. *Nemo potest habere duas Militias, nec duas Dignitates; & est impossibile quod unus homo potest esse in duobus locis uno tempore.* And 5 R. 2. F. Tryal 54. the whole *Spiritual Court* is but one Court; which Book is very remarkable to that purpose. That the *Canon Law* is but one Law: Which reason was also given by Justice *Doderidge* in the same Case, and upon the same point, who said, That the Law of the Church of *England* is not the Pope's Law, but that all of it is extracted out of *Ancient Canons*, as well General as National. Another Reason which he then gave was, Because *Ireland* is a subordinate Realm, and governed by the same Law: Because although before the time of H. 2. they were several Kingdoms or Realms, yet the Laws of *England* were there Proclaimed by King *John*, and is subject to the Laws of *England*. And if the King, having a Title to Present to a Church in *Ireland*, confirm it to the Incumbent under the Great Seal of *England*, it is good. 45 E. 3. 70. (e).

(2) Ibid. f. 234.

(8.) In *Savacre's Case* it was adjudged in the Common Pleas, That if a Baron, or others mentioned in the Statute of 21 H. 8. take divers Chaplains which have many Benefices, and after they discharge their Chaplains from their Service, they shall retain their Benefices during their Lives, and if the Baron takes others to be his Chaplains, they cannot take many Benefices during the Lives of the others, which are Beneficed and discharged of their Services; for if the Law were otherwise, the Lords might make any capable of holding Benefices by admitting them to be their Chaplains (1).

(1) *Savacre's Case.* Owen's Rep.

(9.) *T.* prayed a Prohibition to the *Archies*; the Case was this, One had a Recovery in a *Quare Impedit*, and he had a Writ to the Bishop against *T.* upon which *A.* his Clerk was admitted, &c. and after the Recovery died, and *T.* supposing his Heir to be in the Ward of the King, and that the said *A.* took another Benefice without sufficient Qualification, by which the Church was void by Cession, and he attained a Presentation of the King, and he was Admitted, &c. by the Lord Keeper, being within the Diocess of *Lincoln*, and *A.* sued him in the Ecclesiastical Court, and *T.* prayed a Prohibition, and it was granted *per totam Curiam*; for without question there ought nothing to be questioned in the Ecclesiastical

cal Court after the Induction of the party : And whether it is a Cession or not, doth properly belong to the Common Law : And Jones cited a Judgment in *William's Case* according. Note, that by the Constitution of *Ordo* and *Orbodon*, That Institution and Induction is voidable in the Ecclesiastical Court, if no Prohibition be prayed (u).

(u) *Thornton's Case.*
Winch. Rep.

(10.) In the Case of the King against the Archbishop of *Canterbury* and *Thomas Prust* Clerk in a *Quare Impedit*, was vouched *Holland's Case* in *Cok.* 41. 51. to shew that there is a difference between voidance by Act of Parliament, and Voidance by the Ecclesiastical Law : For before the Statute by the taking of the second Benefice, the first Church was void ; but not so that the Lapse incurred upon it. And as for Pluralities, the words of the Statute are, That it shall be void, as if he were naturally dead ; and therefore if a man takes a second Benefice and dies, Issue ought to be taken, whether the first *vacavit per mortem* ; And it is found, That Not : For it was void before the death of the Incumbent (w).

(11.) P. was Collated, Instituted, and Inducted by the Bishop of *Exeter*, Patron *Dr. Hall* ; the Bishop Collates another, pretending that the first Incumbent had taken a second Benefice, whereupon the first was void ; and *revera* the first Incumbent had a Dispensation : And notwithstanding that, the Bishop Sequesters the Benefice : and upon discovery thereof to the Court, a Prohibition was granted (x).

(w) *The King against the Archbishop of Canterbury and Prust.*
Hetley's Rep.

(12.) In *Bene's Case* against *Tricket*, the point was, Whether the value of the Church for Plurality by 21 H. 8. shall be eight pounds according to the book of Rates and Valuation in the First-fruits Office, or according to the very value of the Church *per Annum*. *Atkinson*, That according to the value of the King's Books : For the Parliament never thought that any man could live upon so little as eight pounds *per Annum*, which is not six pence a day. Note, 38 E. 3. 4 and *Dyer* 237. but by the Court, That it shall be according to the very value of the Church in yearly value in the Statute of 21 H. 8. And by *Gawdy* and *Fenner*, to whom agreed *Telverton*, That the eight pound shall be accounted according to the very value of the Church *per Annum* (y).

(x) *Pinson's Case* in *Hetley's Rep.*

(13.) In a *Quare Impedit* it was doubted, If A. having two Benefices with the Cure by Dispensation, and then take a third Benefice with Cure, If now both the first Benefices, or the first of them only be void. *Hieron* said, That it was adjudged that both of them should be void (z).

(y) *Tinn. 43.*
Eliz. B. R.
Bene vers.
Tricket.

(14.) If the King grant a Licence to an Incumbent to be an Incumbent and a Bishop, and he afterwards be made a Bishop, the

(z) *The King against the Bishop of Chester.*
Nej's Rep.

neſſe is not void. (a) *Henry de Blois*, Brother to King *Stephen*, was Biſhop of *Wincheſter*, and Abbot of *Glaſſonbury* (b).

(15.) It ſeems that at the Common Law, if an Incumbent had taken a ſecond Benefice with Cure, neither the firſt nor the ſecond had been void. (c) But by the General Council of *Lateran*, held in the year 1215. it was ordained, That if a man took divers Benefices with Cure of Souls, the firſt ſhould be void, unleſs he had a Diſpenſation from the Pope. (d) This Conſtitution of the ſaid General Council is ratified and confirmed in *Pecham's* Conſtitutions at a Provincial Synod held in this Realm. (e) Alſo if an Incumbent take a ſecond Benefice with Cure, whereby the firſt is void by the Canon as to the Patron, ſo as he may Preſent before any Deprivation, yet until Deprivation it is not void as to a Stranger; for if he ſues a Pariſhioner for Tithes, the taking of a ſecond Benefice is not any bar to him. *Trin. 13. Car. B. R. per Juſtice Bark.* which Juſtice *Relverton* in his Argument in *Pruſt's* Caſe ſaid, That it had been ſo Adjudged. (f) And if an Incumbent of one or more Benefices with Cure be conſecrated Biſhop, all his Benefices are *ipſo facto* void; upon which Voidance the King, and not the Patron, is to Preſent to the Benefices ſo void by *Ceſſion*; and any Diſpenſation after Conſecration comes too late to prevent the Voidance; for the Pope could formerly, and the Archbiſhop now, can ſufficiently Diſpenſe for a Plurality by the Statute of 25 H. 8.

(g) *Edeſ* verſ. the Biſhop of *Oxford*, in *Vaugh. Rep.*

(g) *Edeſ* verſ. the Biſhop of *Oxford*, in *Vaugh. Rep.*

(g). The chief Text of the Canon Law againſt Pluralities ſeems to be that of the *Decretal de Præbend. & Dign. c. de multa*, where it is ſaid, That in *Concilio Lateranenſi* prohibitum, ut nullus diſverſas Dignitates Eccleſiaſticas, vel plures Eccleſias Parochiales, recipereſ contra Sanctorum Canonum Inſtituta, &c. Et præſenti decreto ſtatui-mus, ut quicumque receperit aliquod Beneficium curam habens anima-rum annexam, ſi prius tale Beneficium habebat, ſit ipſo jure privatus. & ſi forte illud retinere contenderit, etiam alio ſpolicetur, &c. Con-ſonant to which is that in *Decret. Cauſ. 21. q. 1. In duobus Eccle-ſiis Clericus conſcribi nullo modo poeſt.*

Pafch. 9. Jac. B. R. en Ireland en le Caſe de Commenda entre le Roy & Cy-prian Horſſill & Robert Wale, Davis Rep.

In the Caſe of a *Commendam* adjudged in *Ireland*, the Original and Inconvenience of Diſpenſations and *Non obſtante's* was well weighed and conſidered; where it was ſaid, That the *Non obſtante* in Faculties and Diſpenſations was invented and firſt uſed in the Court of *Rome*; for which *Marſil. Pat.* pronounced a *Væ* againſt the ſaid Court, for introducing that clauſe of *Non obſtante*, That it was an ill Preſident, and miſchievous to all the Commonwealths of Chriſtendom. For the Temporal Princes perceiving that the Pope diſpenſed with Canons, in imitation thereof have uſed their Prerogative to diſpenſe with their penal Laws and Statutes, when as before they cauſed their Laws to be religiously obſerved, like the

Laws

Laws of *Medes* and *Persians*, which could not be dispenced with. See the Case of penal Statutes. Co. 7. 4. fo. 36. b. For this Reason it was that a Canonist said, *Dispensatio est vulnus. quod vulnerat jus commune*. And another saith, That all abuses of this kind would be reformed, *Si duo tantum verba, viz. [Non obstante] non impedirent*. And *Matth. Par.* in *Anno Dom. 1246.* having recited certain Decrees made in the Council of *Lions*, which were beneficial for the Church of *England*, *Sed omnia hæc & alia* (says he) *per hoc repagulum [Non obstante] infirmantur*.

(16.) In a *Quare Impedit* the Case was, Dr. *Playford* being Hill. 1610.
Chaplain of the King, accepted a Benefice of the Presentation of a 8 Jac. C. B.
common person; and he after accepted another Presentation of the *Wallop* against
King, without any Dispensation, both being above the value of the Bishop of
eight pounds *per Annum*. The Question was, Whether the first the Bishop of
Benefice was void by the Statute of 21 H. 8. cap. 13. For if that *Exeter* and
were void by the acceptance of the second Benefice without Dispensation, then this remains a long time void, so that the King *Murray, Clerk.*
was intituled to present by Lapse, and presented the Plaintiff. The *Brownl. pa. 2.*
Statute of 21 H. 8. provides. That he who is Chaplain to an Earl, Bishop, &c. may purchase Licence or Dispensation to receive, have, and keep two Benefices with Cure, provided that it shall be lawful for the King's Chaplains, to whom it shall please the King to give any Benefices or Spiritual Promotions, to what number soever it be, to accept and receive the same without incurring the danger, penalty, and forfeiture in this Statute comprised; upon which the Question was, Whether by this last Proviso, a Chaplain of the King having a Benefice with Cure above the value of eight pounds *per Annum*, of the Presentation of a Common person, might accept another Benefice with Cure over the value of eight pounds also of the Presentation of the King without Dispensation? The words of the Statute, by which the first Church is made void, are, That if any Parson having one Benefice with Cure of Souls, being of the yearly value of eight pounds or above, accept or take any other with Cure of Souls, and be Instituted and Inducted into possession of the same, that then, and immediately after such possession had thereof, the first Benefice shall be adjudged in the Law to be void; *Vide Holland's Case*, 4 Co. 75. a. This Case was not argued, but the point only opened by *Doderidge*, Serjeant of the King, for the Plaintiff.

(17.) A. was Parson of M. which was a Benefice with Cure; of the value of eighty pounds, and was Chaplain to the Earl of S. *Tin. 13 Can.*
and obtained a Dispensation to accept of another Benefice, *modo fit* *S. R. Duffin*
within Ten miles of the former, which was confirmed under the *and Lord's*
Great Seal: He accepted of another Benefice Seventeen miles *Cafe. Cro.*
dis- *par. 3.*

stant from the first, and was Instituted and Inducted, both Benefices being within the Diocese of *Lincoln*. The Archbishop in his Visitation Inhibited the Bishop of *Lincoln* not to execute any Jurisdiction during his Visitation: It was found that the Patron had neglected to present to the first Benefice within the Six months; and that the Bishop of *Lincoln* within the second Six months Collated one to the first Benefice, who was Admitted and Inducted. The points were, Whether (1) *Si modo* was a Condition in this Licence, and made the first Benefice void when he took the Second? (2.) Whether the Bishops Collating, during the time of the Archbishops Visitation, and after his Inhibitions, was good? *Resolved*, That in the principal Case, *Si modo* should not be taken for a Condition, and that the Benefice should not be void *quoad* the Patron, as the taking of a second Benefice is by the Statute of 21 H. 8. and then the second point of the Collation by the Bishop, in the time of the Visitation, and also the Inhibition, will not be material.

Mich. 41 &
42 Eliz. B. R.
The Queen and
Page's Case.
Cro. p. 1.

(18.) *Quare Impedit*, pretending the Church void for *Plurality*; The Defendant said he was Chaplain to the Lord *M.* and pleaded a *Dispensation* from the Archbishop of *Canterbury*, and *Confirmation* thereof. In the Letters of *Dispensation* the words were (mentioning the two Benefices to be of small value) *unimus, anneximus, & incorporamus*, the second Benefice to the first without the word of *Dispensamus* thereof: The Court held it a sufficient *Dispensation*; for it is not of necessity to have the word *Dispensamus*; and if the Circumstances prove it, it is sufficient.

Cro. Ibid.

(19.) In the Case between *Whetstone* and *Higford*, it was held, by the Justices, That if the Queen retains a Chaplain by word only, yet he is such a person as may have a *Plurality* within the Statute of 21 H. 8. of *Pluralities*, and is a person able to make a Lease. And in a *Quare Impedit* it was Resolved, That if there be two Parsons of the Church, and each of them hath the entire Cure of the Parish, and both the Benefices be of the value of eight pounds, and the one dieth, and the other be presented, it is a *Plurality* within the Statute of 21 H. 8.

Cro. Ibid.

(20.) The Countess of *K.* being a Widow, retained two Chaplains, and after retained a third; the third purchased a *Dispensation* to have two Benefices with Cure, and he was advanced accordingly, whereof the first was above the value of eight pounds: It was adjudged in this Case, and afterwards affirmed in a Writ of Error, That he was not lawfully qualified within the Statute of 21 H. 8. by which the first Benefice, by acceptance of a second, was void; and that the Title did accrue to the Queen to present; for it was Resolved, That the Statute gives power to a Countess to retain two Chaplains and no more, and when the Statute

The Queen
and Darcie's
Case. Cro. p. 1.
Or Drurie's
Case. vide.
Meer's Rep.

tute is executed she cannot retain a third Chaplain; and the Retainer of the third cannot divest the capacity of *Dispensation* which was vested by her Retainer in the two first Chaplains.

(21.) A Parson having a Benefice of the value of eight pounds, took a second Benefice without Dispensation, being above the value of eight pounds: The Court took no consideration of the Statute of 25 H. 8. and the value there mentioned, but regarded only the true value of the Benefice. Mich. 43 & 44. Eliz. B. R. Bond and Ticker's Case. Cro. par. 1.

(22.) For Title to an Avoidance the Statute of 21 H. 8. was pleaded, touching the taking of a second Benefice with Cure; Issue was upon the Induction; by which it seemed to be admitted, That Admission and Institution did not make the first Benefice void without Induction. Agar and the Bishop of Peterborough's Case. Moor's Rep.

(23.) *Quare Impedit* brought, the Defendant pleaded the Statute of 21 H. 8. cap. 13. of Pluralities, that the last Incumbent had a Benefice with Cure of the value of eight pounds, and took another Benefice and was Inducted 1 Eliz. upon which the Queen did present the Defendant by Lapse: The Plaintiff shewed the Proviso in the Statute of 25 H. 8. cap. 21. That Chaplains qualified might purchase Dispensations and take two Benefices, and that 1 Eliz. before the Parliament he purchased a Dispensation from the Pope, and after he took the second Benefice, and died. The Question was, Whether before the Statute of 25 H. 8. the Pope might grant Dispensations? It was *Resolved*, he could not; for that the King's of England had been Sovereigns within their Realms of the Spiritualities; and the Justices held, that the Dispensation in question was made 1 Eliz. and so out of the Statute of 25 H. 8. cap. 21. and that this Dispensation to retain a second Benefice was against the Statute of 21 H. 8. cap. 13. 21 H. 8. c. 13. 25 H. 8. c. 21. Dolman and the Bishop of Salisbury's Case. Moor's Rep.

(24.) The Countess of K. had two Chaplains by Patent, a third had no Patent of Chaplainship, but he was first Retained, and took two Benefices by Dispensation: It was Adjudged, he was lawful Chaplain; for the Patent is not of necessity, but only in case where he hath cause to shew it, and here he hath no cause to shew it, because her Retainer was good without a Patent. The Queen, Bishop of Lincoln and Clifton's Case. Moor's Rep.

(25.) The Case between *Robins, Gerrard, and Prince* was in effect this. *viz.* A man is Admitted, Instituted, and Inducted into a Benefice with Cure of the value of eight pounds, and afterwards the King presents him to the Church of D. which is a Benefice with Cure, and he is Admitted and Instituted. This Archbishop grants him Letters of Dispensation for Plurality, which Letters the King Confirms, and afterwards he is Inducted to the Church of D. In this Case it was Adjudged, That the Dispensation came too late, because it came after the Institution; for by the Institution the Church is full against all

all persons except the King; and as to the Spiritualties, he is full Parson by the Institution. (2.) *Resolved*, That admit the Church was not full by the Institution until Induction, yet the Dispensation came too late; for that the words of the Statute of 21 H. 8. of Pluralities are [*may purchase Licence to receive and keep two Benefices with Cure of Souls,*] and the words of Dispensation in this Case, were *recipere & retinere*; and because by the Institution the Church was full, he could not purchase Licence to receive that which he had before, and he cannot retain that which he cannot receive.

Wor. Ible.

(26.) In the case of a Prohibition it was Resolved, That by the Common Law before the Statute of 21 H. 8. the first Benefice was void without a Sentence Declarative, so as the Patron might present without notice. (2.) That the Statute of 21 H. 8. of Pluralities is a general Law of which the Judges are to take notice without pleading of it. (3.) That the Queen might grant Dispensations as the Pope might, in case where the Archbishop had not Authority by the Statute of 25 H. 8. to grant Dispensations, because all the Authority of the Pope was given to the Crown by the Statute. But yet the Statute, as to those Dispensations which the Archbishop is to grant, hath Negative words, and the Bishop shall make the Instrument under his Seal.

*Armiger and
Holland's Case.
Moore's Rep.*

CHAP.

C H A P. XXVII.

Of Deprivation.

1. *What Deprivation is, and in what Court to be pronounced.*
2. *The Causes in Law of Deprivation.*
3. *In what Cases Deprivation ipso facto, without any Declaratory Sentence thereof, may be.*
4. *A Cardinal's Case of Deprivation by reason of Miscreancy.*
5. *The Papal Deprivation by reason of Marriage.*
6. *What the Law is in point of Notice to the Patron, in case of Deprivation by reason of meer Laity or Nonage.*
7. *The difference of operation in Law between Malum prohibitum and Malum in se; and in what Cases of Deprivation Notice ought to be given to the Patron.*
8. *Deprivation by reason of Degradation; which Degradation at the Canon Law may be two ways.*
9. *Cawdry's Case of Deprivation for Scandalous words against the Book of Common Prayer, sentenced by the High Commissioners.*
10. *Deprivation for Non-conformity to the Ecclesiastical Canons, by the High Commissioners, agreed to be good.*
11. *Deprivation for not Reading the Articles of Religion according to the Statute of 13 Eliz.*
12. *Deprivation by the High Commissioners for Drunkenness.*
13. *The Church is not void by the Incumbents being Deprivable, without Deprivation.*
14. *For an Incumbent to declare his Assent to the Articles of Religion, so far as they agree with the Word of God, is not that unfeigned Assent which the Statute requires.*
15. *A Church becomes void presently upon not Reading the Articles; and there needs not any Deprivation in that Case.*
16. *A Case wherein a Sentence declaratorie for Restitution makes a Nullity in the Deprivation.*
17. *An Appeal from a Sentence of Deprivation, prevents the Church's being void pro tempore.*
18. *Upon Deprivation for meer Laity or incapacity, the Lay-Patron must have Notice ere the Lapse incurs against him.*

19. *An*

19. *An Incumbent Excommunicated, and so obstinately resisting 40 daies, is Depriveable.*

(1.) **D**eprivation is a discharge of the Incumbent of his Dignity or Ministry, upon sufficient cause against him conceived and proved; for by this he loseth the Name of his first Dignity, and that either by a particular Sentence in the Ecclesiastical Court, or by a general Sentence by some positive or Statute-Law of this Realm: So that *Deprivation* is an Ecclesiastical Sentence Declaratory, pronounced upon due proof in the Spiritual Court, whereby an Incumbent being legally discharged from Officiating in his Benefice with Cure, the Church *pro tempore* becomes void: So that it is in effect the Judicial incapacitating an Ecclesiastical person of holding or enjoying his Parsonage, Vicarage, or other spiritual promotion or dignity, by an Act of the Ecclesiastical Law only in the Spiritual Court, grounded upon sufficient proof there, of some Act or Defect of the Ecclesiastical person deprived. This is one of the means whereby there comes an Avoidance of the Church, if such Sentence be not upon an Appeal repealed. The causes of this *Deprivation* by the Canon Law are many, whereof some only are practicable with us in the Ecclesiastical Laws of this Realm, and they only such as are consonant to the Statutes and Common Law of this Kingdom.

(2.) All the Causes of *Deprivation* may be reduced to these Three Heads: (1) Want of Capacity. (2) Contempt. (3) Crime. But more particularly, It is evident, that the more usual and more practicable Causes of this *Deprivation* are such as these, *viz.* a meer Laity or want of Holy Orders according to the Church of Eng. Illiterature or Inability for discharge of that Sacred Function, Irreligion, gross Scandals, some heinous Crime, as Murther, Man-slaughter, Perjury, Forgery, &c. Villany, Bastardy, Schism, Heresie, Miscreancy, Misbelief, Atheism, Simony, * Illegal Plurality, † Incurigibleness and obstinate Disobedience to the approved Canons of the Church, as also to the Ordinary, * Non-conformity, Refusal to use the Book of Common Prayer, or Administer the Sacraments, in the order there prescribed; the use of other Rites or Ceremonies, order, form, or celebrating the same, or of other open and publick Prayers; the preaching or publishing any thing in derogation thereof, or depraving the same having formerly been convicted for the like offence; (a) the not Reading the Articles of Religion within two Months next after Induction, according to the Statute of 13 Eliz. cap. 12. The not Reading publicly and solemnly the Morning and Evening Prayers appointed for the same day, according to the Book of Common Prayer, within Two months next after Inducti-

on

Vid. Doderidge
de Advowf.

Co. par. 5.

Cawdris's Case.

5 Ed. 4. 3.

3 H. 7. 19.

38 E. 3. 2. b.

Dyer 8. &c. 9.

p. 254.

Co. 5. 8. 2.

Dyer 293.

p. 1. &c. 2.

* 2 H. 4. 37.

† Allen verif.

Nash. Pasch.

13 Car. 1. R.R.

Vid. Parf. Co.

par. 1. c. 9.

* Cro Jac. 37.

(a) St. 1. Eliz.

c. 2.

34 Car. 2. 4.

on the Lord's Day; the not openly and publickly declaring before the Congregation there Assembled his unfeigned assent and consent (after such Reading) to the use of all things therein contained, or in case of a Lawful Impediment, then the not doing ^(b) 14 Car. 2. c. 4. thereof within one month next after the removal of such Impediment; ^(b) a Conviction before the Ordinary of a wilful maintaining or affirming any Doctrine contrary to the 39 Articles of Religion, a peristence therein without revocation of his Error, or rec^(c) 13 El. c. 12. Drunkenness, after Admonition, and 40 days Excommunication: To all which mightion, is cause of also be added Dilapidation, for it seems anciently to have been, a Dilapidator was a just cause of Deprivation, whether it were by destroying the Timber-trees, or committing wast on the Woods of the Church-Lands, or by putting down or suffering to go to decay the Houses or Edifices belonging to the same; ^(d) as appears by *Lyford's Case*, ^(e) as also in the Bishop of Salisbury's Case. ^(f) Conviction of Perjury in the Spiritual Court according to the Ecclesiastical Laws, which although (as aforesaid) it be a just Cause of Deprivation, must yet be signified by the Ordinary to the Patron; ^(g) so also must that Deprivation, which is caused by an Incapacity of the party Instituted and Inducted for want of Holy Orders. ^(b)

^(c) Co. 11. par. 40. 49. in *Lyford's Case*. ^(f) Mich. 12. Jac. B. R. vid. *Parf. Law*, cap. 17. Co. 11. 98. b. 9. E. 4. 34. ^(g) 38. E. 3. 2 & 3. 5 H. 7. 14. acc. ^(b) 13 El. Dyer 292. acc. St. 21. H. 8. c. 13.

(3.) By the Statute of 21 H. 8. if an Incumbent having a Benefice with Cure of Souls, value 8*l.* per ann. take another with Cure, immediately after Induction thereunto, the former is void, and void without any Declaratory Sentence of Deprivation in the Ecclesiastical Court, in case the Second Benefice were taken without a Dispensation; and of such Avoidance the Patron is to take notice at his peril. ⁽ⁱ⁾ And as Avoidance may be by Plurality of Benefices incompatible, without Dispensation: so also by not Subscribing unto, and not reading the 39 Articles (as aforesaid) when by the Statute of 13 Eliz. c. 12. is a Deprivation *ipso facto*, as if the Incumbent were naturally dead; inasmuch that upon such Avoidance there need not any Sentence Declaratory of his Deprivation, but the very pleading and proof of his not Reading the said Articles, is a sufficient Bar to his claim of Tithes, without any mentioning at all his being deprived in the Ecclesiastical Court. ^(k) Yet Sir Simon Degge in his *Parsons Counsellor* putting the Question, What shall be intended by the words [Deprived *ipso facto*,] as whether the Church shall thereby immediately become void by the Fact done, or not till Conviction or Sentence Declaratory; modestly waves his own Opinion, and says it is a *Quere* made by Dyer, what shall be intended

⁽ⁱ⁾ Mich. 9. Car. C. B. rot. 441. *The King and the Bishop of Canter. and Prytt's Case*. Cro. 1. p. 258. acc. ^(k) 31 Eliz. Morris and Eaton's case, adjudged vid. *Parf. Law*. c. 18. *Shutte and Higden's Case* in *Faugh. Rep.*

- (l) Dyer 275.
b. p. 48.
(m) Parl. Co.
p. 1. cap. 9.

tended by the words [*ipso facto* Excommunicate] for striking with a Weapon in the Church-yard, (l) albeit by the Canon Law, which condemns no man before he be heard, *requiritur sententia Declatoria* (m).

(4.) Touching *Deprivation* by reason of *Misceancy*, the Cardinal, who by the Bishop of *Durham* was Collated to a Benefice with Cure, is (it seems) the standing President; in which case it was Agreed, that notwithstanding the Cardinal's being deprived for his *Misceancy* in the Court of *Rome*, yet whether he were *Misceant* or not, should be tried in *England* by the Bishop of that Diocese

- (n) Vid. 5. R.2. where the Church was (n).

Fitz Trial 54.
Hugh's Abridg.
verb. *Deprivation*.

(5.) Among the many Causes of *Deprivation* forementioned, you do not find that of Marriage in the Priest, which was anciently practicable, as appears by what the Lord Coke reports touching an Incumbent in the time of King *Ed. 6.* who being Deprived in Queen *Marys* daies, partly because he was a Married person, and partly because of his Religion, was restored again in the time of Queen *Elizabeth.* In whose Cases it was Adjudged, That his *Deprivation* was good until it was voided by a Sentence of Repeal, whereby he became Incumbent again by virtue of his First Presentation without any new Presentation, Institution, or Induction. (o) In those days it was held, That the Marriage of a Priest was a sufficient cause to deprive him of his Benefice. *Mich. 4. Ma. Dy. 133.*

- (o) Co. 4. PAR.
102. *Windsor's*
Case.

(6.) In the Case where a meer Lay-man is Presented, Instituted, and Inducted, he is (notwithstanding his Laity) such an Incumbent *de facto*, that he is not Deprivable but by a Sentence in the Ecclesiastical Court; but then the Ordinary is in that case to give Notice of such *Deprivation* to the Patron; otherwise, in case the Ordinary for that cause refused him, when he was Presented by the Patron. (p) But where Non-age is the cause of *Deprivation*, as when one under the age of 23 years is Presented, Notice is to be given, it having been Adjudged, That no Lapse shall incur upon any *Deprivation ipso facto* without Notice, seeing the Statute of 13 *Eliz. 12.* says nothing of Presentation; which remaining in force, the Patron ought to have Notice (q).

- (p) 13 *Eliz.*
Dy. 292.

(q) Trin. 18.
Car. B. R. the
B. of *Hereford*
and *Okely's*
Case. *Marsh.*
119. *Hugh's*
Abridg. verb.
Deprivation.

(7.) As in the Admission of a Clerk to a Benefice whatever is a Legal impediment, will also be a sufficient cause of *Deprivation*: so in reference to both, the Law takes care to distinguish between that which is only *Malum prohibitum*, and that which is *Malum in se*; and therefore doth not hold the former of them, such as frequenting of Taverns, unlawful Gaming, or the like, to be a sufficient cause of a Clerks Non-admission to a Benefice, or of his *Deprivation* being Admitted: (r) Otherwise, if you can affect him with that which is *Malum in se*; in which case Notice is to be given the Patron

- (r) 9 *Eliz.*
Dyer 254.

Patron by the Ordinary, of the Cause of his Refusal or Deprivation; (s) as also it is in case of Deprivation for not Subscribing (s) 12 Eliz. Dyer 293. acc. or not Reading the 39 Articles of Religion according to the fore-said Statute of 13 Eliz. 12. which Notice ought to be certain and particular, a general Notice of Incapacity not sufficing; in which case an Intimation of such particular Incapacity affixed on the Church-door (if the Patron be *in partibus longere remotis*, or may not easily be affected therewith) will answer the Law. *Vid.* 18. *Eliz.* Dyer 346. 22 *Eliz.* Dyer 369. & 16. *Eliz.* Dyer 327. & Co. par. 6. 26. *Green's Case.*

(8.) It is evident from the Premises, That a *Deprivation* from an Ecclesiastical Benefice will follow upon a Disgracing or Degradation from the Ecclesiastical Function or Calling, for this *Degradation* is the Incapacitating of a Clerk for discharge of that holy Function, for it is the punishment of such a Clerk, as being delivered to his Ordinary, cannot purge himself of the Offence, whereof he was convicted by the Jury: And it is a Privation of him from those holy Orders of Clerkship which formerly he had, as Priesthood, Deaconship, &c. (t). And by the Canon Law this may be done (t) *Stanf. Plea.* Two ways, either *Summarily*, as by Word only; or *Solemnly*, as *Cor. fo. 130,* by divesting the party degraded of those Ornaments and Rites, & 138. which were the Ensigns of his Order or Degree. (u) But in mat- (u) *Vid. Seld. Tit. of Hon. fo. 787.* ters Criminal Princes anciently have had such a tender respect for the Clergy, and for the credit of the whole profession thereof, That if any man among them committed any thing worthy of death or open shame, he was not first executed or exposed to Publick disgrace, until he had been degraded by the Bishop and his Clergy; and so was executed and put to shame, not as a Clerk, but as a Lay-Malefactor; which regard towards Ecclesiasticks in respect of the dignity of the Ministry, is observed by a Learned Author to be much more Ancient, than any Papistical Immunity; (x) (x) *Ridl. View. p. 2. cap. 2. Sect. 3.* and is such a Privilege as the Church, in respect of such as once waited on the Altar, hath in all Ages been honoured with.

(9.) *Robert Cawdry* Clerk, Rector of the Church of *L.* was deprived of his Rectory by the Bishop of *London* and his Collegues, by virtue of the high Commission to them and others directed, because he had pronounced and uttered slanderous and contumelious words against and in depravation of the Book of *Common Prayer*; but the Form of the Sentence was, That the said Bishop by and with the assent and consent of Five others of the said Commissioners his Companions, and namely which Deprived him. It was not found that the Commissioners were the Natural born Subjects of the Queen, as the Statute Enacts that they should be. And it was moved, That the *Deprivation* was void; (1) Because, that whereas

the Commission is to them, or any three of them, of which the said Bishop to be one amongst others, it ought to have been the Sentence of them all (according to the Authority given to them, which is equal) and not of one with the assent of the other. (2.) Because it is not found, that the Commissioners are the Natural born Subjects of the Queen, as by the words of the Statute they should be. (3.) Because the punishment, which the Statute provides for those of the Ministry which deprave this Book, is to lose the profits of all their Spiritual promotions but for a year, and to be Imprisoned by the space of Six months, and not to be Deprived till the Second offence, after that he had been once committed; and therefore to deprive him for the First offence was wrongful and contrary to the Statute. But the whole Court, for the form of the *Deprivation*, it is that which is used in the Ecclesiastical Courts, which always names the chief in Commission, that are present at the beginning of the Sentences, and for the other they mention them only as here; but of their assent and consent to it, and in such cases we ought to give credit to their Form, and therefore it is not to be compared to an Authority given at Common Law by Commission. And it is to be intended, that the Commissioners were the Natural born Subjects of the Queen, unless the contrary appear: But here at the beginning it is found, That the Queen *Secundum tenorem & effectum Actus predicti* had granted her Commission to them *in causis Ecclesiasticis*, and therefore it appeareth sufficiently that they were such as the Statute wills them to be. And for the *Deprivation*, they all agreed that it was good, being done by Authority of the Commission; for the Statute is to be understood, where they prosecute upon the Statute by way of Indictment, and not to restrain the Ecclesiastical Jurisdiction, being also but in the Affirmative. And further, by the Act and their Commission they may proceed according to their discretion to punish the Offence proved or confessed before them, and so are the words of their Commission warranted by the Clause of the Act. And further, the Ecclesiastical Jurisdiction is saved in the Act. And all the Bishops and Popish Priests were deprived by virtue of a Commission warranted by this Clause in the Act. *Vid. Hill. 33 Eliz. Rot. 315. (x).*

(x) *Cawdry*
verf. Atten.

Pop. Rep.
Vid. this Case
Coke lib. 5. 1.

(10.) Before many Noble men, Archbishops and Bishops, and the Justices and Barons of the Exchequer, (1) agreed, That the *Deprivation* of Ministers for Non-conformity to the last Canons was lawful by the High Commissioners: For by the Common Law the King hath such a power in Causes Ecclesiastical; and it is not a thing *de novo*, given by the first of *Eliz.* For that is Declaratory only, &c. and the King may delegate it to Commissioners: And the K. without a Parliament may make Constitutions from the Govern-
ment

ment of the Clergy : and that such a Deprivation *ex officio*, without Libel is good. (2.) That the Statute of 5 H. 5. c. 4. is to be intended, when they proceed upon Libel, and not when *ex officio*. Read the Statute. (3.) When their Petition is Subscribed by a great number, with intimation; That if the King denies their Suit, that many thousands of his Subjects shall be discontented ; That this is an Offence Finable at discretion, and is near to Treason, by raising Sedition by Discontent, &c. (y). Vid. More's Rep. Trin. 2. Jac. in the Star-Chamber.

(11.) By the Statute of 13 Eliz. cap. 12. it is Enacted, That every person, &c. to be Admitted to a Benefice with Cure, except that within Two months after his Induction, he publicly Read the said Articles † in the same Church whereof he shall have Cure, in the time of Common Prayer there, with a declaration of his unfeigned assent thereto, &c. shall be upon every such default ipso facto immediately deprived. Then follows afterward a Proviso relating to this clause, viz. Provided always, That no Title to confer or Present by Lapse, shall accrue upon any Deprivation ipso facto, but after Six months after Notice of such Deprivation given by the Ordinary to the Patron. Thus the Patron immediately upon such Deprivation may Present, if he please, and his Clerk ought to be Admitted and Instituted; but if he doth not, no Lapse incurs until after Six months after Notice of the Deprivation given to the Patron by the Ordinary, who it seems is to supply the Cure until the Patron Present. In the last Case of the L. Dyer. 23 El. it was Resolved, That where a man having a Living with Cure under value, accepted another under value also, having no Qualification, or Dispensation, and was Admitted, Instituted, & Inducted into the Second, but never Subscribed the Articles before the Ordinary, as the Stat. of 13 El. requires. Upon Question, whether the First Living *vacavit per mortem* of him or not? the Court Resolved, That the First Living became *vacant* by his death, & not by accepting the Second, because he was never Incumbent of the Second; for not Subscribing the Articles before the Ordinary, whereby his Admission, Institution, and Induction into the Second Living became void, as if they had never been. This differs from the Case of not Reading the Articles within Two months after Induction: For the not Subscribing the Articles makes, that he never was Incumbent of the Second Living, & consequently no cause of losing the First; but the not Reading the Articles within Two months after Induction, doth cause a deprivation of that whereof he was Incumbent. For as an Incumbent, he that without qualification or Dispensation doth take a Second Living, doth thereby lose the First: so the same Incumbent for not Reading the Articles within Two months after his Induction into the Second may lose the Second,

(y) Hill. 2. Jac.
13 Feb. in

Ne's Rep.
post. Case.
Rye versus
Fullcombe.

† The 39 Arti-
cles of Religion.

cond, and thereby lose both, viz. the First by taking a Second without *qualification* or *dispensation*, and the Second for not Reading the *Articles*, as aforesaid, whereof he was Compleat Incumbent by Admission, Institution, and Induction of the Second Living full Two months before he lost it for not Reading the *Articles*

(x) Vid. *Shute*
and *Higden's*
Case in
Vaugh. Rep.

Mich. 8. Jac.
Parker's Case.
Brownl. Rep.
P. 2.

(a) Hill. 15. Jac.
B. R. inter
Hitchin and
Glover. Ad-
judg'd.

(b) Mich. 13.
Jac. B. The
Bish. of *Car-*
liste's Case,
per Curiam.

(c) Rol. Abr.
ver. *Presentment*
lit. p.

(d) *Smith* and
Clerk's Case.
Gro. par. 1.

(12.) *Parker*, being Parson of the Church was deprived by the High Commissioners for Drunkenness, and moved for a Prohibition, but it was not granted; and he was directed to have an Action for the Tithe, and upon that the validity of the Sentence shall be drawn in question. If a man be Admitted, Instituted, and Inducted to a Church, and afterwards is deprived for that he was Instituted contrary to the course of the Ecclesiastical Law, such Sentence of deprivation is void at the Common Law, for that it is a Lay-Fee by the Induction. (a) If a Town erect a Common School, and allow Maintenance to the Schoolmaster, the Bishop may not remove him and put in another at his pleasure: But if he be a Recusant, he may remove him by the Statute of 23 Eliz. cap. 1. (b).

(13.) Although an Incumbent be *deprivable*, yet the Patron cannot Present another until he be *deprived*, for till then the Church is not void. Also if the Visitor by the Kings Command return into *Chancery* good matter for *deprivation* of the Kings Clerk, yet the King cannot Present another to the Church, until he be *deprived*. *Contra* 17. E. 3. 59. b. (c).

(14.) Where two Incumbents were of one Church, one sued the other in the Ecclesiastical Court to be *deprived* for not Reading the *Articles*, and giving his Assent to them according to the Statute of 13 Eliz. The issue was, whether he gave his Assent; the Jury found he read the *Articles*, and said *I give my assent to them as far as they agree with the Word of God*: And it was Adjudged That it is not such an unfeigned Assent as is within the intent of the Statute (d).

(15.) In a Prohibition the Case was, J. S. seized in Fee of the Advowson of the Church of C. Presented thereunto D. who was Instituted and Inducted, but did not read the *Articles* according to the Statute of 13 Eliz. Afterwards came the General Pardon of 18 Eliz. Afterwards D. was *deprived* by Sentence for not Reading the *Articles*, he Appealed, and depending the Appeal B. the Plaintiff obtained a Presentation from the Queen, and was Instituted and Inducted. D. died, and he that had the Advowson Presented R. the other Defendant, who sued in the Ecclesiastical Court to be Admitted. It was Resolved, That the Church became void presently by the not Reading of the *Articles*, and there needed not any *Deprivation*, and the Pardon in this case works nothing; for the Church

Church being once void for not Reading the *Articles*, he cannot by the Pardon be restored, and the Pardon will not reach to it; for the punishment is to lose his Benefice; *Adjudged*, the Prohibition to stand. (e) But if a man be *deprived* for an offence done *Tempore* (e) Trin. 41. *Parliamenti*, and the Offence be after pardoned by the same Parli- Eliz. B. R. ament, and then the Parliament endeth. In this case the *Deprivation* Baker and *Brent's Case*. is void in it self, and the party need not sue to reverse it; for the Parliament relateth to the First day thereof: As, was Resolved in *Foxe's Case* (f)

(16.) In a *Quare Impedit* the Case was, That *L.* had Two Pre- Eliz. C. B. sentations, and *W.* the Third, of Inheritance perpetual: *L.* Present- *Foxe's Case*. ed *P.* who was Instituted and Inducted, and afterwards in the time Cro. p. 1. of Queen *Mary* was *deprived*, because a Married man; wherefore he again Presented *D.* who was Inducted. Afterwards *P.* was restored, with a Declaration that he had good Title: Afterwards *P.* died, and *W.* Presented *H. L.* brought the *Quare Impedit*. It was Adjudged for the Plaintiff, because the Sentence declaratory for the Restitution made a Nullity in the *Deprivation*, and so avoided the Incumbency of *D.* and so *L.* had good Title to Present at his Second Turn, and *W.* had no Title to Present as yet. (g)

(17.) In *Hornigold's Case* against *Bryan* it was said, That if a (g) *Lovedon* Judgment of *Deprivation* be given in the Ecclesiastical Court a- and *Windsor's* gainst a Parson for his Benefice: if presently upon this Judgment Case. he makes his Appeal, the Church is not void, but he remains Parson Morea Rep. during all the time of this Appeal; for if by this he doth reverse Trin. 13 Jac. the Judgment, he shall need no new Institution and Induction: B.R. *Hornigold* As if a Judgment be given of a Divorce in the Ecclesiastical Court; verſ. *Bryan*. and this is after reversed by an Appeal, there shall need no new Bullſtr. par. 3. Marriage. And in this Case *Coke* Chief Justice said, That 39 E. 3. hath the same Case: And that if an Appeal be from a Sentence of Divorce, they are now by this *Baron* and *Feme* again: So if a Parson be *deprived*, and Appeals, he is by this Parson again, and may have an Action of Treſpaſs. And as touching Appeals in reference to *Deprivation*, there was a famous Case in the Court of C. B. about 5 or 6 Jac. a *Worceſterſhire* Case, between *Lechmere* Plaintiff and *Carr* Defendant, in an Action of Treſpaſs, and upon *Non Culp.* pleaded, a Special Verdict was found; viz. That *Bonner* was made Bishop of *London*, in the time of King *H. 8.* and so continued until 2 Ed. 6. at or about which time a Commission issued forth to the then Lord Chancellor and others, to Convent Bishop *Bonner* before them, and to examine him; and if they found him to be Contumacious, and would not Answer them, the Commissioners were impowered then to Imprison him, or to Deprive him: The Commissioners upon this did first Imprison him, and after-

afterwards proceeding further against him, to Deprivation: *Bonner* from this Appeal (and his Appeal not heard) *Nicholas Ridley* is made Bishop of *London*, who makes a Lease of the Park and Manor of *Bushey*, under which Lease the Defendant claimed. Afterwards, viz. *Primo Maria*, *Ridley* is declared to be an Usurper, and *Bonner* by a Sentence Definitive is restored again to the Bishoprick of *London*, and makes a Lease of the Premises demised to the Plaintiff. Upon which Special Verdict the Points stirred were these: (1) Whether the Deprivation of *Bonner* was lawful or not; the Authority by the Commission being in the Disjunctive, viz. to Imprison or to Deprive him; and (as it was urged) they first Imprisoning of him; had thereby executed their Authority, and so then the Deprivation void. (2) Admitting the Deprivation void, then *Bonner* still continued Bishop of *London*: And then *Ridley* was never Bishop: for that there could not be two Bishops of *London* simul & semel, and so the Lease by him made to the Defendant was a void Lease. (3) Admitting the Deprivation good, then *Quid operatur* by the Appeal, whether it did not suspend the Sentence of Deprivation: And if so, then again, *Ridley* was no lawful Bishop; and so the Lease, under which the Defendant claimed, was void. This Case was Learnedly Argued by Common Lawyers, and also by Civilians, and the Judges inclined to be of Opinion for the Plaintiff. But the Defendant perceiving this, preferred his Bill in Chancery and there obtained a Decree against *Lechmere*.

(18.) If a meer Lay-person, who is altogether incapable of a Benefice, be Presented, Instituted, and Inducted; yet the Church is not therefore said by the Common Law to be void, as if no Presentation had been, but is still by that Law full of an Incumbent *de facto*, licet non *de jure*, until by Sentence Declaratory in the Ecclesiastical Court for want of Capacity the Church be Adjudged void; and upon this no Lapse shall incur against the Lay-Patron, without Notice (of such Incapacity and Sentence of Deprivation thereupon) to him given. King *H. 4.* Presented one that was Incapable of his Presentation, and the Presentee was thereby Admitted, Instituted, and Inducted, and afterward the Pope enabled the Presentee by his Bull; yet the King had a *Scire facias*, and thereby recovered his Presentation again, because the Incumbent was not capable when he was Presented.

Doderidge
of Advowsons,
Lc. 14.

(19.) If the Parson or other Incumbent be Excommunicate, and he so remaineth in his Obstinacy for the space of 40 days, he is for this deprivable of his Benefice, and yet the Church is not void in Deed, without Sentence of Deprivation given against him; and if before such Deprivation, the King as Supream Ordinary grant him

a Dispensation, he shall hold his Benefice. Also Dilapidations, or spoil of the Church Benefice hath at Common Law been held worthy of Deprivations; which Law as it adjudgeth not the Church actually void (Death excepted) without a Sentence of Deprivation: So though such Sentence of Deprivation be meerly wrongful, yet by that Law, as well as by the *Canon*, the Dignity is void, and the Sentence remaineth in force until it be reversed by Appeal; and therefore if the party deprived within due time Appeal (upon such Sentence of Deprivation given against him) such is the nature thereof, that it will hold the Sentence (upon which it was first brought) in suspense: So that if it be brought upon Deprivation, it voideth the vigour thereof, and reviveth the former dignity; for such Church shall not be void until the first Sentence of Deprivation happen to be affirmed in the Appeal. Touching *Deprivation* by Statutes and Positive Laws, *vid.* 13 *Eliz.* c. 12. 26 *H. 8.* cap. 3. revived by 1 *Eliz.* cap. 31. or 3.

Doderidge. ib.

F f f

CHAP.

C H A P. XXVIII.

Of Incumbents; as also of Residence
and Non-Residence.

1. Incumbent, who properly such; why so called, and what things preparatory to a Compleat Incumbent.
2. The Rights of a Compleat Incumbent.
3. The Rights of an Incumbent's Executor as to the Glebe.
4. The Resident Incumbent's duty, that keeps a Curate.
5. Whether he be an Incumbent, who is in by the King's Presentation, where the King mistakes his Title.
6. Whether an Incumbent may plead (as such) who was not Incumbent ante impetrationem Brevis.
7. Whether the Non-Residency of an Incumbent were punishable by the High-Commissioners.
8. How the 80 daies absence in a year shall be understood to include Non-Residency, according the Statute, &c.
9. The Laws in force concerning Residence and Non-Residence; and who are qualified for Non-Residence.
10. The Canon in the Provincial Constitutions touching the Non-Residence of Vicars on their Vicarages.
11. The Form of the Oath of Residence on a Vicarage.
12. Whether a Parson inhabiting in a Messuage very nigh adjoining to the Parsonage House, which he keeps also in his own hands, be a Resident within the intent of the Statute.
13. What the Law requires for Residence; and what are the just Causes of Non-Residence.
14. An Incumbent stands charged with the Arrears of a Pension, issuing out of his Church, that were behind in his Predecessor's time, as well as those accruing in his own time.
15. The Constitution touching the Oath of Residence; as also how the Incumbent may be out of his Parish; and yet be reputed as Resident.
16. What shall be accounted such an Absence or Non-Residence within the Statute, as to avoid a Lease made by the Incumbent.
17. Indictment against a Common Informer, exhibiting an Information against Two Persons; one for Non-Residence; the other for taking a Farm.

18. *Covenants as well as Leases, made void by the intent of the Statute of 13 & 14 Eliz. by reason of Eighty daies Absence.*

(1.) **I**ncumbent, from *incumbere* (signifying, as well to possess and keep safely, as to endeavour earnestly) is a Clerk duly Possess of, and Resident on his Benefice with Cure.

(a) For the faithful discharge whereof he is to imploy his Study and utmost endeavour: (b) For which reason especially he is so denominated. There are Four things preparatory to the being of a Compleat Incumbent: (1.) The Patron's Presentation, or his free Gift or Commendation of his Clerk to the Parsonage or Vicarage by writing in his favour to the Bishop. (2.) The Bishops Admission of such Clerk by his allowance or approbation of him after due Examination, and by making a Record of his Name accordingly. (3.) The Clerks Institution to such Benefice or Vicarage by the Bishops word, *Institu te, &c.* (4.) The Clerk's Admission or Induction, whereby he is put in actual possession thereof by the Archdeacon's, or others delivery to him of the Ring or Keys of the Church-door, ringing the Bells, &c. And until these things be done, he is not a *Compleat Incumbent*. (c) After which, and possession Six months, there is such a Plenarty as gives such a Title to that Presentation; as will barr *pro hac vice* any others in a *Quare Impedit*. (d) So that those things that are to make a perfect Incumbent (after Presentation had) do depend upon the duty of the Ordinary; as (1.) Admission, which requireth Examination of the Clerk; whereupon sometimes ensueth refusal, and thereupon either Notice or no Notice (as the case requires) is to be given to the Patron. (2.) Institution, (3.) Induction. Upon the Patrons not Presenting within the time limited, the Lapse incurs to the Bishop, from him to the Metropolitan, and from him to the Crown, where it resteth. But if the Bishop take his time, then is his Presentation a Collation, and in the Right of the Patron himself.

(2.) The *Incumbent* is that person in Law, to whom the Fruits of any Ecclesiastical Benefice do belong, insomuch that the Fruits taken during the vacation or vacancy of a Benefice, shall be restored to the next Incumbent, (e) who stands charged to the King for the First-Fruits, to be accounted immediately from and after the avoidance or Vacancy of any such Benefice or Spiritual promotion (f), and for that end, and towards the payment of the said First-Fruits, the next Incumbent shall have a restitution of the Tithes, Fruits, Oblations, Obventions, Emoluments, Commodities, Advantages, rents, and all other revenues, Casualties, and Profits whatsoever, certain, &

(a) Co. on L.
fo. 119. b.
(b) 10 H. 6. 7.

(c) Art. Cle.
ch. 13. 14. H. 7.
28 Dyer. 326.
Co. 5. 22. 4. 79.
(d) 2. 1. El. 4. 7.
3. 4. & 5. 1. 4. 7.
88. Co. 4. 79.
7. 38. on Litt.

(e) St. 28. H. 8.
c. 11.

(f) Ibid.

(g) Stat. Ibid.
& Coke pla.
fo. 568.

(b) St. ibid.

(i) Ibid. 21 H.
6. fo. 20. 34. H.
6 fo. 38.

(k) Hill. 18. Jac.
Woods Case.

(l) Per Co.
Mich. 12. Jac.
B. R. Case.

Grange and
Notters.

Roll. Rep. (b)
(m) Mich. 11.
Jac. B. R. Case

of the King

verf. Bishop of
Norwich.

(n) St. 14. Car.
2. c. 14.

uncertain, belonging to any Archdeaconry, Deanry, Prebend, Parsonage, Vicarage, Hospital, Wardenship, Provostship, or other Spiritual promotion, Benefice, Dignity, or Office, growing or arising during the vacancy of any of the said Spiritual promotions; (g) and every Archbishop, Bishop, Archdeacon, Ordinary or any other person, having to his or their uses received the same, that shall refuse to render and restore the same to the next Incumbent, shall forfeit the treble value of what he hath so received (b).

(3.) If any Incumbent happen to depart this life during the Incumbency or Plenarty, shall before his death have caused any of his Glebe Lands to be manured and sowed at his proper cost and charges with any Corn or Grain, he may in that case make his last Will and Testament of all the profits of the Corn growing upon the said Glebe Lands by him so manured and sown. (i) And if one be put into a Place; then removed, and another put in, the first shall have the Tithes hapning in such Vacancy; (k) for the succeeding Parson shall have the Tithes hapning during the Vacancy, deducting the charges of collecting the same, and serving the Cure during such Vacancy. Also if an Incumbent be removed in a *Quare Impedit*, the Plaintiff shall not have the main profits. (l) And an Incumbent being in by Usurpation, he cannot be removed but by a *Quare Impedit* (m).

(4.) An Incumbent Resident that keeps a Curate, is obliged to read the Common Prayers in his Parish Church once a month in his own person, on pain of forfeiting Five pounds for every omission (n).

(5.) In *Thomson's Case*, where T. Libelled for Dilapidations against the Executors of his Predecessors, and *Henden* moved for a Prohibition; for that, that T. is not Incumbent, for his Presentation was by the King *ratione Minoritatis* of one C. and the King had not any such Title to Present: for where the King mistakes his Title the Presentation is void, and he is no Incumbent 6. Rep. 26. *Green's Case*. And Sir *Tho. Gawdy's Case*, where the King presented *jure Prærogat.* when he had another Title, and the present action was adjudged void; and whether he is Incumbent or not, that shall be tried. But by the Court a Prohibition was denied, because that he was now Incumbent; And the Judges would not take notice of the ill Presentation of the King: But in case of *Simony* the Statute makes the Church void, and then the Judges may take notice of that, and grant a Prohibition, if the Parson sues for Tithes. But if a *Quare Impedit* be brought, & it appears that the King had not cause of Presentation, then a Prohibition may be granted: which was also granted by all the other Justices. Mich. 3. Car. C. B. *Thomson's Case*. *Hesley's Rep.*

(6.) In

(6.) In *Dame Chickley's Case* against the Bishop of Ely it was said by *Henden*, That an Incumbent by the Statute of 25 Ed. 3. c. 7. cannot plead (*quatenus* such) unless he be Incumbent *ante diem impetrationis Brevis*, unless he be Incumbent *pendente lite* he cannot plead, &c. *Hutton*, if one be Presented, Instituted, and Admitted before the Writ, and Inducted after, and before his Pleader, he may plead well (o).

(7.) A Libel was against H. Vicar of S. in the High Commission Court at York, because that he was *not Resident*, but lived at *Doncaster*, and neglected to serve his Cure; and that divers times he, when the High Court visited, spoke so loud, that he was offensive to many, and being reprov'd for that, he gave a Scornful Answer: and that there was one *Wright* in the Parish, who had a Seat in the Church, and that the Vicar would spit in abundance into the said Seat, and that when *Wright* and his Wife were there. And that in his Sermon he made Jest, and said, *That Christ was laid in a Manger, because he had no money to take up a Chamber, but that was the knavery of the Inn-keeper*; he being then in contention with an Inn-keeper in the Parish. And that in time of Divine Service he thrust open the door of *Wright's* Seat, and said, That he and his Wife would sit there, in disturbance of Divine Service. And for that a Prohibition was prayed and granted; for the High Commission cannot punish *Non-Residency*, nor breaking the Seat in Divine Service: And the other were things, for which he shall be bound to the good behaviour; and the Complaint ought to be to the Ordinary (p).

(8.) Note, by *Tanfield*, that by the Statute of 13 Eliz. cap. 20. of *Non-Residency*, That if the Parson be Absent 80 days in a year, although it be at several times (*viz.*) ten days at one time, and twenty daies at another time, until eighty daies, &c. That is within the Statute, by which it hath been adjudged (q).

(9.) The personal *Residence* of all Ecclesiastical persons on their Cures respectively is a duty so incumbent on them for the better discharge of their Sacred Function, the prevention of Dilapidations and the maintenance of Hospitality, that it is enacted, That every Spiritual person promoted to any Archdeaconry, Deanry, or Dignity in any Church Cathedral or Collegiate, or Beneficed with any Parsonage or Vicarge, shall be personally resident and abiding in, at, or upon such Dignity, Prebend, or Benefice, or one of them at the least; and that if any such person wilfully Absent himself from his said Benefice, &c. by the space of a Month at one time, or 2 Months at several times in any one year, to be accounted at several times, that such person so absented shall forfeit ten pounds for every such default. (r) It is also further provided, That the Parson

(o) Pasch. 3. Car. C. B. in dist. Case. Chickley. Hetley's Rep.

(p) *Howson's Case*.
Heti. Rep.
13 Eliz. c. 20.
That Statute speaks of Absence not above

80 daies in a year in the Parson; 40 daies in a Curate.
(q) *Sidner* ver. *Calver*.
Noy's Rep.

(r) Se. 12 H. 8. cap. 13.

or

or Vicar shall be Resident in and upon his Parsonage or Vicarage-House (if he have any) and not at any other House in the Parish; but if he hath no House on his Glebe, or be removed without fraud for his Health, or without fraud Imprisoned, or be beyond Sea in his Majesties service, or without fraud abide in any University within this Realm to study, or be a Chaplain qualified for Plurality by the Statute of 21 H. 8. either of these may excuse his Non-Residence for the time. (s) Also the King may give a License to any of his own Chaplains to be *Non-Resident*: (t) And any Ecclesiastical person may be *Non-Resident* for such time as without fraud he is attending a Suit in Chancery. There are also other Chaplains of other persons that are qualified for *Non-Residence*, (u) which for brevities sake are here omitted. And where a Chaplain is qualified in respect of his service for Plurality, if his Lord die, or be Attainted, or be removed from his place, it will not, it seems, suffice that he be Resident only upon one of his Livings, without the King's Special License with a *Non obstante* (x).

(10.) The Canon made by Cardinal Osbo, and afterwards Confirmed and *de novo* Established by Othobon, seems very severe as to Vicars in case of *Non-Residence*; for in their constitutions it is Ordained, That if any *Non-Resident* shall receive the profits or Fruits of a Vicarage, he shall restore the one Moity thereof to the Church, one half of the other Moity to the Poor of that Parish, and the rest to the Archdeacon of the place, if he discharge his duty in making a diligent Enquiry yearly herein, and shall forthwith make it known to the Bishop; and whoever shall disobey the Premises by one Month, shall also be deprived of his other Benefices, if he have any, and be rendred incapable of ever having that Vicarage again, or any other Benefice for Three years: And in case the Archdeacon shall neglect what herein is enjoined him, he shall be deprived of that part allotted him as aforesaid, and suspended *ab ingressu Ecclesie*. *Constit. Othobon. de Residentia Vicariorum*.

(11.) The Oath of *Residence* on a Vicarage is as followeth, *viz.* *Ego A. B. juro, Quod ero Resident in Vicaria mea, nisi aliter dispensatum fuerit à Ducefano meo*. What Spiritual persons may be discharged of *Residence*, and by what means, *vid. St. 21 H. 8. 13.*

(12.) In an Information upon the Statute of 21 H. 8. *cap. 13.* of *Non-Residency*, it was found by Special Verdict, That Dr. N. was Incumbent, invested in the Rectory of S. and that he was also seized of a House in S. aforesaid, situate within twenty yards of the Rectory, and that the mansion-house of the said Rectory was in good Repair, and that Dr. N. held that in his hands and occupation with his own proper Goods, and did not Lett it to any other, and that he inhabited in the said Messuage, and not in the Parsonage. The Statute

(s) Co. 6. 21. b.
(t) 21 H. 8.
cap. 13.

(u) 25 H. 8.
cap. 16.
33 H. 8. c. 28.
21 H. 8. c. 13.
Vid. Pars.

Couns. p. 1.
cap. 7.
(x) Co. 4. 119.
2.

Hill. 8 Jac.
1610 Canning
vers. Dr. Newman
Brownl.
pa. 2.

Statute of 21 H. 8. cap. 13. provides, That every Parson promoted to any Parsonage, shall be Personally resident, and abiding in, at, and upon the said Benefice: And in case any such Spiritual Parson keep not Residence at his Benefice, as aforesaid, but Absent himself willfully by the space of a Month together, or two Months, to be accounted at several times in any one year, and makes his Residence or abiding in any other places by such time, that then he shall forfeit for every such default Ten pounds, the one half to the King, the other half to the Informer. The Question was, Whether the said Dr. N. were *Non-Resident*, and incurred the Penalty of this Statute? It was Argued by *Houghton*, that he had incurred the penalty of the Statute, and was *Non-Resident* within the intent thereof; he said, that to some intent all the Parish may be said the Benefice of the Parson, for that he hath Benefit out of it, and he is called Parson of such a Town or Parish; but this is not the Benefice that the Statute intends, upon which he ought to be *Resident*, &c. Also he said, That there were Seven causes of making the said Statute, whereof but two are to our purpose; the one is *Hospitality*, the other *Relief* of the *Poor*, and these are to be done in the Parsonage house, for this is the Free Alms of the Church: and so it was Adjudg'd, 34 Eliz. B. R. *Broom* and *Hudson*; and 40 Eliz. B. R. between *Butler* and *Goodal*. *Coke* 21. b. That he ought to be *Resident* upon the Parsonage-house, and not elsewhere; and he agreed, That Imprisonment without deceit, and sickness, are good Excuse. For the Defendant, *Barker* Serjeant argued, That it appears by the Special Verdict, that Dr. N. held the Parsonage-house in his own hands, and did not Lett it; whence he infer'd, That his Servants were Resident upon it, &c. and that by the Council of *Lateran* all the Parish is made the Benefice of the Parson, &c. also that before the said Statute every Spiritual man was obliged and compellable by the Ecclesiastical Law to be Resident; yet if he were in the Kings Service, or an Officer of the *Chancery*, he should be excused, as appears in the *Register*, fo. 51. b. though that he were Dean, the which Office meerly requires his *Personal Residence*, as it is there said. Th's Case was compounded by the Lord *Coke*, but he intended this was *no Residence* within the Statute, for this was not his Benefice, but the Tenants part of that, as he said, hath been Adjudged into the Exchequer.

(13.) In *Butler* and *Goodal's* Case, it was Resolved upon the Statute of 21 H. 8. That a Parson of a Church ought to stay and be commorant upon his Rectory (*viz.*) upon the Parsonage-house, and not in any other House, although it be within the Parish, but lawful Imprisonment without Covin, is a good cause of *Non-Residence*: Also, if there be no Parsonage-house (for *impotentia excusat*

Vid. More's Rep.
Co. 5. *Butler*
and *Goodal's*
Case 40. Eliz.
B. R.

excusat legem) also Sickneſs without fraud, if the Patient remove by advice of his Counſel in Phiſick, *bona fide*, for better Air and recovery of his health. The Statute is intended not only for ſerving the Cure, but alſo for maintaining the habitation of the Parſon, for him and his Succeſſors, and for Hoſpitality. *Vid. Co. 6. pa. 2. l. 6. Cro. par. 1.*

Cro. par. 1.

(14.) In the Caſe between *Trinity Colledge and Tunſtall* it was Reſolved, That an Annuity by Preſcription for a Penſion iſſuing out of the Church lay againſt the Incumbent, as well for the Arrearages due in the time of his Predeceſſor, as in his own time; for that the Church it ſelf is charged with it in whoſe hands ſoever it comes.

(15.) By Cardinal *Oſtho's* Conſtitution [*De Inſtitutione Vicariorum*] It is Ordained, That none ſhall be admitted to a Vicarage, unleſs he firſt take his Oath, that he will have his perſonal and conſtant Reſidence thereon; otherwiſe his Inſtitution thereto to be null and void, and the Vicarage to be conferred on another. *Conſt. Oſthon. de Inſtit. Vicarior.* From which Canon the Gloſs thereon doth raiſe this Queſtion, *viz.* Whether a Vicar not having poſſibly any Dwelling-houſe yet built for his habitation in the Pariſh, and living for that reaſon in ſome neighbour-place, and at another man's Table out of his Pariſh, may according to the Oath aforeſaid enjoyed by the ſaid Canon, be ſaid to be reſident? where the Queſtion though argued in the Negative, yet is Reſolved in the Affirmative; and that he ſhall be reputed as Reſident, if he be ſo nigh ſituate to his Pariſh, that the Inhabitants thereof may conveniently have acceſs to him, as oft as the Pariſhioners have need of his Miniſtry, and ſo as on all requiſitions he be ready to adminiſter the Sacraments within the Pariſh; for in conſtruction of Law, he is ſaid to make his reſidence ſufficiently there or in that place, where he doth diſcharge his work and duty, albeit he lives elſe where: *L. cum quidam facit. ff. de ſun. inſtruct.* Likewiſe, the Law in requiring ſuch Reſidence aims as well at Hoſpitality as at the diſcharge of the Miniſtry. Alſo, he that is Abſent only about the affairs of the Church, is reputed in Law as Preſent and Reſident: Alſo the Biſhop may diſpenſe with his Non-reſidence notwithstanding ſuch Oath aforeſaid: *Glo. in ver. Reſidentiam. diſt. Conſt. Oſtho.* Yea, he may alſo be ſometimes Abſent, not only upon neceſſary, but alſo upon his Family-occations, with Liſenſe from the Biſhop, as alſo for his Recreation, where it is for recovery of his health, or prevention of Sickneſs. *Gloſs. ibid.*

(16.) In an Action upon the Caſe, for a Promiſe; upon a *Non aſſumpſit* pleaded, a *Special Verdict* was found, upon which the Caſe appeared to be this: The Defendant by Indenture did Demiſe unto the

the Plaintiff all his Tithes of Corn and Hay, and the Agreement between them was this, the Plaintiff should pay him for the Tithes fifty five shillings, and this by agreement was to be paid at a day certain, then following: The Defendant having this Tithes, passed the same in this manner to the Plaintiff, and upon this Agreement and promise, being not performed, the Plaintiff brought his Action. It was found, that the Defendant confessed the Agreement to be so, but in Bar he pleaded the Statute of 13 Eliz. cap. 20. and of 14 Eliz. cap. 11. for the avoiding Leases made by a Parson, by his Absence from his Living by the space of eighty daies in one year, and also shews that one *Stallow* who was Parson of *Sbarrington*, to whom these Tithes did belong (and in whose Right the Defendant claimed them) was Absent from his Parsonage by the space of eighty daies in one year, and shews in what year, and so by this his interest determined, and Agreement with the Plaintiff, by this made void; but they found further (as the Plaintiff made it to appear) That *Stallow* the Parson of *Sbarrington* was not Absent in manner as it was alledged, for that they found, that he did dwell in another Town adjoining, but that he came constantly to his Parish-Church, and there read Divine Service, and so went away again: They did also find that he had a Parsonage-House in *Sbarrington* fit for his habitation; and whether this were an Absence within the Statute, as to avoid his Lease, they left that to the Judgment of the Court. *Telverton* Justice, This is a good *Non-Residency* within the Statute of 21 H.8. cap. 13. but not an Absence to avoid a Lease made within the Statute of 13 Eliz. cap. 20. It cannot be said here in this Case, that he was Absent, for he came four daies in every week, and in his Parish-Church did read Divine Service. *Williams* Justice, upon the Statute of 13 and 14 Eliz. the Parson ought not to be Absent from his Church eighty daies together in one year (*a Rectoria sua*;) but this is not so here, for he came to his Church, and read Divine Service there every Sunday, Wednesday, Friday, and Saturday, and therefore clearly this Cannot be such an Absence, within the scope and intention of these Statutes, as thereby to avoid his Lease. *Telverton* Justice, he ought to be Absent eighty daies together, *per spatium de Octogint. diebus & ultra*, and this to be altogether at one time, and so the same ought to have been laid expressly, the which is not so done here, for that it appears here, that he was at his Parsonage-house, and did read Prayers every Sunday, Wednesday, Friday, and Saturday; and so the whole Court were clear of Opinion, that this Absence here as the same appeared to be, was not such an Absence by the space of Eighty daies in one year, to avoid his Lease within the said Statute, and so the Defendants Plea in Bar not good, and

Pasch. 7. Jac.
B. R. Shepherd
vers. Twissie.
Bulstr. Rep.
par. 7.

therefore by the Rule of the Court Judgment was entred for the Plaintiff.

Mich. 10. Jac.
B.R. 7. S. 2.
against *Marryn*
and *Gunny-*
stone. Bulstr.
par. 2.

(17.) An Information was Exhibited against Two Parsons by J.S. upon the Statute of 21. H. 8. cap. 13. against one of them for *Non-Residency*, and against the other for taking of a *Farm*; the one of them pleaded Sickness, and that by the Advice of his Physicians he removed into better Air, for Recovery of his health; and this is justifiable by the whole Court: *vid.* more for this *Coke* 6. par. fo. 21. in *Butler* and *Goodall's* Case. The other pleaded, That he took the Farm for the maintenance of his House and Family; and this also is justified by the Opinion of the whole Court. *Crook* moved the Court for the Defendants, That the Plaintiff was a Common Informer, and that he did prefer this Information against them, only for their vexation, and so to draw them to compound with him, as formerly he hath done so by others, for which they prosecuted an Indictment in the Country, upon the Statute of 18 Eliz. cap. 5. made to punish common Informers for their Abuses. The whole Court did advise them to prosecute this Indictment against him. *Crook* moved for the Defendants, That in regard the Informer is a man of no means, that the Court would order him to put in sufficient Sureties to answer Costs, if the matter went against him, and then the Defendants would presently answer the Information. *Williams* Justice, *nullam habemus legem*, this is not to be done; but the Rule of the Court was, That the Defendants should not answer the Information, until the Informer appeared in person.

Trim. 14. Jac.
B. R. *Rudge*
vers. *Thomas*
Bulstr. par. 3.

(18.) In an Action of Covenant the Plaintiff in his Declaration set forth, that the Defendant was Parson of D. and did Covenant, That the Plaintiff should have his Tithes of certain Lands for thirteen years; and that afterwards he Resigned, and another Parson Inducted, by which means he was ousted of his Tithes, and for this cause the Action brought. The Defendant pleads in Bar the Statutes of 13 Eliz. cap. 20. and 14 Eliz. cap. 11 for *Non-Residency*, upon which Plea the Plaintiff demurr'd in Law. It was urged for the Plaintiff, That the Plea in Bar was not good, because it is not averred, that the Defendant had been Absent from his Parsonage by the space of Eighty daies in a year, for otherwise the Covenant is not void by the Statutes. For the Defendant it was alledged, That the pleading of the Statute of 13 Eliz. is idle, but by the Statute of 14 Eliz. this Covenant is made void; for by the Statute, all Covenants shall be all one with Leases, made by such Parsons; and in this case, if this had been a Lease, this had been clearly void by Surrender of the Parson; and so in case of a Covenant. *Doderidge* and

and *Houghton* Justices, The Statutes of 13 and 14 *Eliz.* do not meddle with Assurances at the Common Law, nor intended to make any Leases void, which were void at the Common Law; and therefore this Covenant here is not made void by the Statute, unless he be Absent Eighty daies from his Parsonage. *Coke* Chief Justice agreed with them herein. They all agreed in this Case for the Plaintiff, and that by the Preamble of 14 *Eliz.* it is shewed the intent of the Statute to be to make Covenants void, within the Provision of 13 *Eliz.* by Absence for Eighty daies: And Judgment in this Case was given for the Plaintiff.

C H A P. XXIX.

*Of Abbots and Abbies; also of Chauntries,
and of the Court of Augmentations.*

1. Abbot, *what; why so called; the several kinds thereof; and how many anciently in England.*
2. *A famous Abbot anciently in Ireland: The manner of their Election prescribed by the Emperour Justinian: Anciently the Peers of France were frequently Abbots.*
3. *The ancient Law of King Knute concerning Abbots.*
4. *The Abbot, with the Monks, making a Convent, were a Corporation.*
5. *Abbots were either Elective or Presentative; they were Lords of Parliament: How many Abbies in England, and which the most Ancient, Founded by King Ethelbert.*
6. *Chaunter and Chauntries, what, and whence so called; their use and end; 47 belonging anciently to St. Pauls in London; when and by what Laws their Revenues were vested in the Crown.*
7. *Before King John's time Abbots and Priors were Presentative, afterwards Elective.*
8. *Six differences taken and Resolved on in a Case at Law touching Chauntries.*
9. *Certain Cases in Law touching Lands, whether under pretence of Chauntries given by the Statute to the King, or not.*
10. *What the Court of Augmentation was, the end and use thereof, when Erected, how Established, and by whom Dissolved.*

(1.) **A** Bba and Abbas have one & the same signification, therefore Abbots are called *Patres, cult. de Regular. In scb. Concil. 3. nu. 7.* It is either an Hebrew or Syriack word, signifying *Pater* with the Greeks and Latins, from the two first Hebrew Elements or Letters, *Aleph* and *Beth* inverted; which Name the Monks first assumed at their Original in *Syria* and *Egypt*. And although now in this Kingdom we know no more of this word [*Abbot*] than the very Name thereof; yet for his Antiquities sake he hath the Alphabetical precedence in the Index of this Abridgment,

ment, whether he be *Archimandrita*, *Novel. Conf.* 117. or *Cenobiarca*, or *Archimachus*. *Hottom. in ver. Feuda, Marfil. colum. de Ecclesi. redit. c. 15. nu. 5. 6.* whether *Miter'd*; and thereby exempt from the Dioceſan's Jurisdiction, as having within their own Precincts Episcopall Authority in themselves, and being Lords in Parliament, whence called *Abbots Sovereign*, 9 *R. 2. c. 4.* Or not *Miter'd*, but subject to the Dioceſan in all Spiritual Government. *c. Monasteria. 18. q. 2. c. Abbas, & c. Visitandi, cum 4. seq. ibid. Omnes 16. q. 7. & c. cum Venerabilis. Extra. de Relig. Dom. vid. Stow. Ann. p. 442.* So called *Abbas*, because he is *Pater Monachorum*, Januen. in *suo Catbol. glo. Jo. Andr. de Rescript. c. 1. verb. Abbas.* in *Clem. & Coke de Jure Ecclesiast. fo. 28.* and hath the chief government of a Religious House, and who with the Monks makes a *Covent*. Of these Abbots, together with two or three Priors there were heretofore in England about the number of Thirty in all. What Consecration is to a Bishop, that Benediction is to an Abbot, but in divers respects; for a Bishop is not properly such until Consecration, but an Abbot being Elected and Confirmed, is properly such before Benediction. *cap. de Supl. negl. Pral. lib. 1. & 10. Clem. 8. Statuimus, de Stat. Monach. in Clem. & cap. Minimus, de Accusat.*

(2.) The Venerable Mr. Bede speaks of an Island in Ireland which ever had an Abbot vested with such power and Authority, that every Province, yea, and the Bishops themselves were under his Government, and subject to this Jurisdiction: *Beda lib. 3. de Gestis, cap. 3. Spelm. de Prim. Ecclesi. Angl-Sax. An. 603.* The Emperour Justinian in the First Book of his Codes hath expressly ordained and prescribed the manner and form of the Election and Confirmation of an Abbot, and what persons they ought to be, and how qualified, that shall be accounted worthy of that Ecclesiastical Dignity. *Gl. 1 sit. 3. l. & l. 47. 40. De Episc. & Cler. & Novel. 5. cap. 9. & Novel. 123. c. 34.* Mr. Blount in his *Nemo-Lexicon* takes notice of the word [*Abbacy*] and saies, it is the same to an *Abbot*, as Bishoprick is to a Bishop, resembling it to the word *Paternity*, and cites a very Ancient Record wherein that word is used. *An. 34. & 35 H. 8. c. 17, 18. Sciant quod Ego Isabella Comitiss. Penb. pro Salute Anime meae Dedi Deo & Abbatbie de Nurtleg, totam Wicham juxta dictam Abbatbiam, &c.* In these latter Ages the Abbots, through the favour of Princes, and their respect to the Church, have been reputed as *Peers* and *Secular Lords*, to whom they granted the Provenues of *Abbacies* proportionable to such Dignity for the support thereof: Thus many of the Peers of France have very anciently and frequently been *Abbots*, as appears by *Paradini*, who wrote the *Annals of Burgundy* nigh 7 hundred years since,

and

and then affirmed, that he had seen very Ancient Records, wherein the Peers of France used these styles and distinctions, viz. Duke and Abbot, Earl and Abbot, &c. *Guil. Paradis. Annal. Burgund. lib. 2. sub. An. 1103. & Prat.*

(3.) Notwithstanding the ill opinion, which in these daies not without cause is conceived of the Ancient Abbies, yet it cannot without some breach of charity be well supposed; but that such Houses, commonly called *Religious*, were in the primitive and true intent thereof better purposed by the Founders; than after practised by their Inhabitants; for by the Law made in the daies of *C. Knute. nu. 6.* it is evident, what strict devotion and blameless Conversation the Ancient Princes of this Realm expected from such as then possessed these Abbies: The Law was this, viz. *We will that Gods Ministers, the Bishops, Abbots, &c. do in a special manner take a right course, and live according to Rule; that they call to Christ night & day, much & oft, & that they do it earnestly: And we Command them, that they hearken to God, & love Chastity: Full truly they wit, that it is against the Right to meddle with Women for Lusts sake: Annot. Ridl. View, &c. cap. 4. Sect. 1.* Whereby it seems these Spiritual Fathers were suspected of old to incline to the Flesh all daies of the Week. An *Abbot* might be presented to a Church, for he was capable of an Appropriation, whereby he was perpetual Parson Imparsonce, and had *Curam Animarum.* 34. H. 6. 15

(4.) The *Abbot*, or the chief Head of *Abbies*, being together with the Monks of the same House, a *Covent*, made a Corporation, and was not by the Common-Law further charged with his Predecessors Acts, than for such things as were for the use of the House, or such Acts as were done under the Common-Seal thereof (a) And albeit a Creditor had a Specialty against a Monk; yet not the Abbot, but the Monk's Executors were chargeable for his Debt contracted before his entry into Religion, unless it were for some such thing as came to the use of the House (b).

(5.) Of these Abbots some were *Elective*, others *Presentative*, and under this Title were comprehended other Corporations Spiritual, as Prior and his Covent, Friars, Canons, and such like. And as there were Lord-Abbots, so there were also Lord-Priors, who had exempt Jurisdiction, and were Lords of Parliament: *Co. de Jur. Ecclesiast. fo. 28. a.* It is supposed, that the Abbot of *St. Austins* in *Canterbury* was the ancientest of any in this Kingdom, Founded by King *Esbelbert* in *An. 602.* and next to him in Antiquity the Abbot of *Westminster*, founded by *Seabert* King of the *West-Saxons*, *An. 604.* Some difference there is among Authors touching their Number in this Realm, whereof some reckon but *Twenty Six.* *Sir Ed. Coke* says they were *Twenty Seven* Abbots and *Two* Priors. (c)

But

(a) Terms
Law, verb.
Abbot.

(b) *Ibid.*

An. 602.

(c) *Co. on*
Litt. fo. 97.

But a very Modern Writer gives us a Catalogue of no less than *Thirty three Abbots and Priors*; (d) whereof some were Priors Aliens born in *France*, Governours of Religious Houses, erected for Foreigners here in *England*, suppressed by *Henry the Fifth* after his Conquests into *France*, and their Revenues after given by *Henry the Sixth* to other Monasteries and Houses of Learning, especially for the erecting of King's Colledge in *Cambridge* and *Eaton*. Stow. *Annals*, 582. 1 H. 5. c. 7.

(66.) Chaunter [Cantator] A Singer in the Quire. (e) At St. Davids in *Pembrokehire*, the Chaunter is next to the Bishop, there being no Dean. (f) Chauntry [Cantaria] *Ædes sacra; ideo instituta & dotata prædiis, ut Missa ibidem cantaretur pro anima Fundatoris & Propinquorum ejus.* These were commonly little Chapels or particular Altars in some Cathedral or Parochial Church, endowed with Lands or other Revenues, for the maintenance of one or more Priests, to officiate as aforesaid; whereof mention is made in certain Statutes in this Realm, (g) though not to such superstitious uses as aforesaid. A man might make a Chauntry, by License of the King without the Ordinary, for the Ordinary had nothing to do therewith: 9 H. 6. 16. It might be Found in a Cathedral Church, also in any other Church: 9 H. 6. 17. Roll. Abr. ver. Chauntry, lit. A. Q. 387. Of these Chauntries there were (it seems) 47, belonging to St. Pauls Church in *London*. (h) The Superstitious main use and intent of these Chauntries originally was for prayers for Souls departed, under a supposition of Purgatory, and of being released thence by Masses Satisfactory; and is in *Adam's Case*, fo. 112. mentioned by Sir *Hen. Hobart* Chief Justice in the Case of *Pitts* against *James*, That Prayer for such Souls was the general matter of all *Obits*, *Anniversaries*, and the like, which were but several forms of Prayers for Souls: And (as in the said Case of *Pitts*) if a man give Land to a Parish-Priest, to pray, or say Mass for his Soul; this is within the Law, that is within the Statutes of 37 H. 8. c. 4. and 1 Ed. 6. c. 14. as it is held 16 *Eliz. Dyer*, 337. for to this purpose he is a Souls Priest, not a Parochial. (i) By which Statutes all Chauntries, and all their Lands and Hereditaments are given to the Crown, and all Lands, Rents, and Profits given to the finding of a Priest for the Superstitious ends aforesaid, to continue for ever, are vested in the actual possession of the King and of his Heirs and Successors for ever; who shall also have by the said Statute of 1 Ed. 6. all the Common goods of such Chauntries, and the Debts thereof shall be paid to the Kings Treasurer; and shall also have all Lands, and all such sums of money, and part of the issues of Lands given for the maintenance or for the finding of any *Anniversaries*, *Obits*, *Lights*, *Lamps*, &c. Only the same doth.

(d) *Mr. Blount* in his *Nemo-Lex*.

(e) *An. 13 EL*

cap. 10.

(f) *Camb.*

Brit.

(g) 37. H. 8.

cap. 4.

1 Ed. 6. c. 14

15 Car. 2. c. 9.

(h) *v. Dugdale's Hist. Eccl.*

(i) *Trin. 12.*

Jac. rot. 2187.

Case Pitts

vers. *James*.

Hob. Rep.

(k) St. 1 Ed.
6. c. 14.

doth not extend to such Lands, as whereof the Governours of such Colledges as were mentioned therein, or Chauntries, were seized to their own uses, nor to any Lands or Rents given by the King for the term of his life only, nor to any Copy-hold Lands; and all Rents and yearly profits due to any Patron, Donor, and Founder of any of the said Chauntries, &c. and the Right of others (except the Governours of Houses) are by the said Act saved to them: (k) All Chauntries, Colledges, Free-Chappels and Hospitals, were by Parliament given to the King H. 8. for the carrying on of the War against France and Scotland. Towards the Charges of which Wars the King obtained a Grant in Parliament of the same, with the Lands thereto belonging, to be united to the Crown: But dying before he took the benefit thereof, he left that to such of his Ministers, who had the managing of Affairs in his Son's Minority; Heyl. Hist. Eccles. pag. 12. In the Reign of King Ed. 6. one of the great Affairs was the retrieving of a Statute made in the 27th year of King H. 8. by which all Chauntries, Colledges, Free-Chappels, and Hospitals, were permitted to the disposing of the King for term of his life; but the King dying before he had taken many of them into his possession, it was set on foot again in the time of King Ed. 6. and by Parliament during his Reign it was Enacted, *That all such Colledges, Free-Chappels, and Chauntries, as were in being within Five years of the present Session, which were not in the Actual possession of the said late King, &c. other than such as by the Kings Commissions, should be altered, transported, and changed, together with all Mannors, Lands, Tenements, Rents, Tithes, Pensions, Portions and other Hereditaments, to the same belonging, after the Feast of Easter then next coming, should be adjudged and deemed, and also be in the Actual and Real possession and Seisin of the King, his Heirs and Successors for ever.* And although the Hospitals, being at that time 110, were not included in this Grant, as they had been in that to the King deceased, &c. yet there were 90 Colledges within the compass of that Grant (those in the Universities not being reckoned in that Number) and no fewer than 2374 Free-Chapels and Chauntries; the Lands whereof were thus conferred upon the King by Name, but not intended to be kept together for his benefit only. In which respect it was very strongly insisted on by Archbishop Cranmer, That the dissolving of these Colledges, Free-Chappels and Chauntries, should be deferred until the King should be of Age; to the intent that they might serve the better to furnish and maintain his Royal Estate, than that so great a Treasure should be consumed in his Non-age, as it after was. These Chauntries consisted of Salaries allowed to one or more Priests, to say daily Mass for the Souls of their deceased Founders and their

Friends:

Friends: which not subsisting on themselves, were generally incorporated and united to some Parochial, Collegiate, or Cathedral Church. No fewer than 37 in Number being (as aforesaid found and Founded in *St. Pauls Free Chappels*, though Ordained for the same intent, were independent of themselves, of stronger Constitution and richer Endowment than the Chantries severally were. All which Foundations having in them an admixture of Superstition (as presupposing *Purgatory*, and Prayers to be made for the deliverance of the Soul from thence) were therefore now suppressed upon that account. *Heyl. Hist. Eccles. in temp Ed. 6. pag. 50. 51.*

(7.) Before King *John's* time the King and other Founders and Patrons of *Priories* and *Abbies*, were wont to Present *Priors* and *Abbots*: (l) But by King *John* there was a Free Election granted unto *Priors* (m). (l) 11. H. 4. 68.
b.
(m) Ibid.

(8.) In *Adams* and *Lambert's* Case touching *Chauuntries* these differences were taken: (1) If one give 20 *l.* per annum for the Finding of a Priest, and limit to the Priest 10 *l.* per annum; all is given to the King, for the residue shall be intended for the finding of Necessaries: otherwise it is, if a Condition be annexed to the Gift, to give 10 *l.* per annum to a Priest, there the King shall have but 10 *l.* (2) Land of 20 *l.* per annum. is given to find a Priest; with 10 *l.* per annum. thereof, and that the other 10 *l.* shall be to the Poor, the King shall have but 10 *l.* But if it be for finding a Priest and maintenance of Poor men, without limiting how much the Priest shall have, the King shall have the Land, for otherwise he shall have nothing. (3) If Land of 20 *l.* is given for finding Salary for a Priest with 10 *l.* of it, and also a good use is limited, there the King shall have but 10 *l.* although the other Necessaries are to be found for the Priest, because a good use in certain shall be preferred before a Superstitious uncertain use; but if nothing in certain be limited to the Priest, the King shall have the Land. (4) If Land be given to find a Priest, the King shall have it; but if a Priest have but a Stipend, the King shall have but the Stipend. (5) When a certain Sum is limited to a Priest, and other good uses are also limited, which depend upon the Superstitious use, all is given to the King. (6) If all the uses be Superstitious, of what certainty soever they are, the Land is given to the King; otherwise it is, if there be any good use (n).

(9.) The Case was where *A.* devised to the Dean and Chapter of *T.* 400 *l.* to the intent to find a *Chauuntry* in their Church perpetually, and an *Obit* for the Soul of *D.* and that the *Chauuntry-Priest* should have 40 Marks yearly; King *H. 4.* gave License to the Dean and Chapter to purchase divers Land in *F.* ad *opera pietatis*: In the Will of *A.* they purchased Houses in *F.* and made Or-

H h h

dinances

(n) Co. 4. *A.*
dams and
Lambert's
Case. 44 & 45.
Eliz. B. R.

dinances how the Priests should be maintained, and obliged themselves & *omnia bona sua, ad performandum*; and they employed 8*l.* for the maintenance of the Priest, and other Sums for the *Obit*: *Resolved*, That it was not a *Chauntry*, either in truth, or in reputation, within the intent of the Statute of 1 *Ed.* 6. because here are not any Lands given by *A.* and his Intent cannot make a *Chauntry*, nor appoint any Lands thereunto, but obliged their Goods for the payment of an Annual Sum to a Priest; and when no Lands are given, nor employed to that purpose, it is not reason they should be given to the King (o).

(o) Mich. 2.
Jac. B. R. Hol-
loway and
Watkins Case.
Cro. par. 2.

A Freeman of London seized of Messuages of the value of 9 *l.* 4 *s.* *per ann.* out of which a Quit-rent of 42 *s.* *per ann.* was paid, 6 *H.* 7. devised the same to the Parson and Church-wardens of the Parish of S. and their Successors, That the Church-wardens should receive the Profits thereof, and therefore should find a Chaplain for ever, to pay for the Soul of him and his Ancestors and to find an *Anniversary*, expending yearly on it 13 *s.* 4 *d.* and the Residue of the profits thereof to be expended and employed about the Reparations of the said Church; which were done accordingly. The Question now was, Whether these Messuages were given to the King by the Statute of 1 *Ed.* 6. of *Chauntries*? It was said, part of the Profits were given for a good use, and that should save the Lands: But *Resolved*, because that was uncertain, for it is (*si quid fuerit*) and also for that it appeareth, That the Superstitious uses and the Quit-rent did amount to the full value of the Messuages; and the value shall be taken as it was at the time of the making of the Will, and not to be of any greater value; that the said Messuages were given to the King by the said Statute (p).

(p) Pasch. 12.
Car. B. R.
Humphreys &
Knigh's Case.
Cro. par. 3.

A man devised two Houses in L. to the Church-wardens of S. (1) To find an *Obit*, and to bestow 3 *s.* *per annum* upon the same *Obit*. (2.) The residue of the Profits to Repair the said Church of S. and to provide Ornaments in the said Church. In this Case it was Adjudged, That by the Statute of 1 *Ed.* 6. no more of the Land was to the King, than was given to the *Obit*; and the Devise to the other uses of the rest was good (q).

(q) Hart and
Brewer's Case.
Cro. par. 1.

A Citizen and Freeman of London seized of divers Messuages and Tenements of the yearly value of 30 *l.* 6 *s.* 8 *d.* by his Will before the Statute of 1 *Ed.* 6. Devised the same to the Corporation of *Skinners of London*, and that 42 *s.* 8 *d.* thereof should be employed upon an *Obit*, and 12 Marks yearly thereof upon the Priest, and the residue to be employed upon poor men of the Corporation decayed by Misfortune, who inhabited the said Messuages and Tenements, and appointed the said Poor men to pray for his Soul, and further with the Profits to repair the Messuages and Tenements, and

and after the Statute of 1 Ed. 6. was made of *Chauntries*. It was the opinion of the Court, (1) That Lay-Corporations are excepted out of the Statute for their Lands, which they have to increase their Treasure for the good of the Corporation, but not for Lands, which they have to employ to Superstitious uses. (2) Resolved, That all the money which was given for the *Obis*, and the finding of a Priest, was a Superstitious use, and given to the King by the Statute; but that which was given for the maintenance of the Poor men; and although it was appointed them to pray for his Soul, which was a Precept suitable for that time, and which was given for the Reparation of the Messuages, was not given to the Crown by the said Statute: And *Turner's Case* was vouched to be Adjudged, where Land was given to the intent, that his Feoffees should keep an *Obis* with so much of the Profits of it as they should think fit in their discretion, that the Land thereby was not given to the Crown, but so much of the yearly Rent as the Feoffees employed to that purpose; and if they had employed nothing that way, then nothing was given to the Crown: In the principal Case it was Adjudged against the Queen and Informer. (r) And in the Case between the Queen and *Palmer* it was said by *Anderson* Chief Justice, That where a Gift is made to sustain Poor men and Mass-Priests, without limiting a certain quantity, how much to one use, and how much to the other use, there the Queen shall have the whole Land: But if the quantity was appointed as to one use, and how much to the other use, there the Land is not forfeited, but only so much as is employed to the Superstitious uses (s).

(10.) In order to the better execution of the Premises, there was a Court established, commonly called the Court of *Augmentations*, erected as a Court of Record, by Authority of Parliament *An. 27 H. 8.* which was to have one Great Seal, and one Privy Seal; consisting of a Chancellor as the chief and principal Officer thereof, a Treasurer, Attorney, Solicitor, Clerk, Usher, and Messenger. All Lands, &c. belonging to Monasteries, Priories, and other Religious Houses, and Purchased Lands were within the survey and government of this Court; which (as the Lord *Coke* says) could not be erected but by Parliament, because a Chancellor and a Court of Equity were constituted. (t) There were also other Ministerial Officers that had relation to this Court; for there were Ten Auditors, called Auditors of the Revenues of the said Augmentations, and Seventeen particular Receivers of the said Revenues. (u) This Court of Augmentations, together with the Court of General Surveyors being repealed, dissolved, extinguished, and determined by King *H. 8.* by his Letters Patents in the 38th year of his Reign, a new Court of Augmentations was erected by his Letters Patents;

(r) *The Case of the Skinners of London.*

(s) *Pafch. 30. Eliz. More's Rep.*

(t) *Co. Inst. p. 2. cap. 15.*

(u) *St. 27 H. 8. c. 27.*

(x) St. 7 E. 6.
c. 2. vid. the
Rehear[al] of the
Stat. & Coke
ubi sup. c. 16.

(y) Co. ibid. &
Dyer 4 Eliz. 6.

(z) Heyl. Hist.
Eccl. p. 135.

which Repeal and Dissolution thereof was held void in Law, because they had been erected by Authority of Parliament: For which reason also the new Erection of the new Court of Augmentations was held likewise void; and therefore the said Letters Patents, as well for the dissolution of the former, as for the erecting of the later new Court of Augmentations, were after confirmed and established by a Statute enacted by King *Ed. 6.* (x). But afterwards *Q. Mary*, according to the power given her for dissolution of the said Court, by Act of Parliament, did dissolve the same by her Letters Patents, *Dat. 1. Jan. in primo Regni*, and the day next following by other Letters Patents united the same to the Exchequer, which was utterly void, because she had dissolved the same before: So as she pursued not her Authority; and so it was Resolved by all the Judges. (y) The end and intent of this Court was, that the K. might be justly dealt with touching the profit of such Religious Houses; and the Court took its name from this, that the Revenues of the Crown were so much augmented by the suppression of the said Religious Houses and the Land; for by the suppressing of some, and the surrendring of other Religious Houses, the Royal *Intrado* was so much increased in the time of *H. 8.* that for the better managing of it, the K. erected first the Court of *Augmentations*, and afterwards the Court of *Surveyors*; But in short time, what by the profuseness of some, and the avariciousness of others, it was at last so retrenched, that it was scarce able to find work enough for the Court of Exchequer. Hereupon followed the dissolving of the said Two Courts in the last Parliament by this King (z).

CHAP.

C H A P. XXX.

*Of Annates or First-Fruits; as also Tenths;
of Aumone or Frank Almoign.*

1. Annates, what; why so called; paid anciently to the Pope; when and by what Laws translated to the Crown; a Court thereof, when erected, and by whom dissolved.
2. The great Antiquity of Annates or First-Fruits; the great Revenue it brings to the Papal See; often complained of as a great grievance anciently.
3. The Pope's receiving of Annates compared to Aaron the High Priest's receiving Tithes of Tithes: The Original, Antiquity, and Equity thereof controverted by some of the Ancient Canonists.
4. What the Tenure of Aumone or Frank Almoign is; a description thereof, with its use and end.
5. The difference between Statute and Common Law touching Annates or First-Fruits, whether due and payable upon Institution, or not till Induction.
6. To whom the Tenths of Spiritualties were anciently paid, and how they came to the Crown originally.

(1.) **B**Y the Statute of 25 H.8.20. *Annates and First-Fruits* of Archbishopricks and Bishopricks seem to be one and the same thing, and were Anciently paid to the See of Rome, and that throughout all Christendom, as were also the *Primitiæ*, *First-Fruits*, or Profits of every Spiritual Living, but were afterwards by another Statute translated from the Pope to the Prince. (a) For the due regulation whereof there was a Court purposely erected by a Third Statute, (b) whereby it was made a Court of Record, and commonly called the Court of the *First-Fruits and Tenths*, and so continued until it was dissolved by Queen Mary; (c) since which time it was never restored, albeit the Profits were reduced again to the Crown by the Queen Elizabeth, (d) and the matters thereof to be transacted, were transferred to the Exchequer. The *First-Fruits* after the last Avoidance were probably called *Annates*, because they took their measures from the rate or proportion of one years profit of all Spiritual Livings and Promotions, and accordingly

(a) St. 26 H.8. cap. 3.

(b) St. 32. H.8. c. 35.

St. 34. H.8. 17.

7 Ed. 6. 2.

1 Eliz. 4.

(c) St. 1 Mar. Seff. 2. cap. 10.

(d) dict. St.

1 Eliz. 4.

Mich. 5 Jac.
Co. lib. 12.

Co. Infr. par. 4.
cap. 14.

Co. ibid.

Num. 18. 26,
&c. vid. Jerom.
in Ezek. c. 44.
v. 28, &c.

accordingly are to be compounded for : so that these *Annates*, *Primitiae*, and *First-Fruits* are all one; and it was anciently the value of every Spiritual Living by the year, which the Pope, claiming the disposal of all Ecclesiastical Livings, reserved. These Impropriations began about the time that *Polydore Virgil*, lib. 8. cap. 2. makes mentions of, vid. *Concilium Viennense, quod Clemens Quintus indixit pro Annatibus*. These *First-Fruits* were given to the Crown 26 H. 8. cap. 3. Sir Ed. Coke cites an Ancient Record of this Subject, *Hill. 34 Ed. 1. An. 1307*. At a Parliament held at *Carlisle*, great complaint was made of Oppressions of Churches, &c. by *William Testa* (called *Mala Testa*) and Legate of the Pope; in which Parliament, the K. with the assent of his Barons, denied the payment of *First-Fruits*; and to this effect he wrote to the Pope : whereupon the Pope relinquished his Demand, and the *First-Fruits* for Two years were by that Parliament given to the King. These *First-Fruits* or *Annates*, *Primitiae*, are the *First-Fruits* after Avoidance of every Spiritual Living for one whole year (except Vicarages not exceeding 10 l. and Parsonages not exceeding 10 Marks) but all are to pay *Tenths*. Which *Tenths* Ecclesiastical *Decimae*, are the Tenth part of the value of all Ecclesiastical Livings yearly payable to the King, his Heirs and Successors, by the said Statute of 26 H. 8. cap. 3. and 1 *Eliz.* to be valued according to the value of Ecclesiastical Livings, which were sometimes valued by a Book of Taxation made in 20 Ed. 1. which remaineth in the Exchequer, & by another Taxation in 26 H. 8. which also remaineth in that Court. And according to this latter Taxation are the values of Ecclesiastical Livings computed for the *First-Fruits* and *Tenths*. The Lord Coke says, That the Bishop of *Norwich* had in 19 E. 3. by Prescription time out of mind, &c. *First-Fruits* within his Diocese of all Churches after every Avoidance: But these were also given to the Crown by the Statute of 26 H. 8. cap. 3. And as for the *Tenths* the *Canons* do hold, That the Pope pretended to have them *Jure Divino*, as due to the High Priest by pretence of these words, *Præcipe Levitis atque denuncia, cum acceperitis à filiis Israel Decimas quas dedi vobis, Primitias earum offerre Domino, id est, decimam partem Decimæ, ut reputetur vobis in Oblationem Primitiarum tam de arvis, quam de torcularibus, & universis quorum accipietis Primitias offerre Domino, & date ea Aaron Sacerdoti*. But the Parliament in 25 H. 8. & 26 H. 8. were not of opinion that these *Tenths* did belong to the Bishop of *Rome*, as appears by the several Preambles of the Stat. then enacted: And had they been due *Jure Divino* to the Pope, it is not probable that Queen *Mary* by the Act of 2 & 3 Ph. & M. c. 4. would have exonerated and discharged the Clergy thereof, nor refused to have had them paid to the Pope; nor could the Bishop of

Nor-

Norwich (as aforesaid) have prescribed to have First-Fruits within his Diocese, if they had been due to the Pope *de jure divino*, specially for that *Anthony de Becke*, for whom the Prescription was made was a Retainer to the Court of *Rome*, and made Bishop of *Norwich* by the Pope. *Vid. Co. Instit. par. 4. cap. 14.*

(2.) It was an old Observation, & of no less truth than Antiquity, that there never was any Invention that ever brought more Treasure to the Bishop of *Rome*, than this of *Annates*, which is of far greater Antiquity than some Modern Writers suppose: so *Polydore Virgil*. *Pol. Virg. de invent. rerum, lib. 8. cap. 2. Et Annates more suo appellant Primos fructus unius Anni Sacerdotii vacantis, aut dimidiam eorum partem.* Historians do not agree, what Pope first imposed First-Fruits: *Vals. An. Do. 1316. Trivet. Ranulphus Cistrensis, lib. 7. c. 42. Polyd. Virg. ubi supra. Platina, Fox, &c.* This Tribute or Revenue long since, when the Bishop of *Rome* had not such large possessions as now he hath, yet at vast expence and charge to uphold and maintain his Dignity, was gradually by little and little imposed on such vacant Benefices as himself conferred and bestowed, which, as *Hosiensis* (contemporary with *P. Alex. the Fourth*) doth affirm, was often complained of as a very great Grievance: so that after this *Labarel* declared in the Council at *Vienna*, That *Clement the Fifth*, who was made Pope in the year 1305. forbade the receiving thereof; and that laying the same aside, the Twentieth part of the Sacerdotal Revenues should instead thereof be annually paid to the Bishop of *Rome*; but this not taking effect, the Pope so retained the said *Annates* to his Exchequer, as that to this day it remains one of the considerablest parts of his Revenue. *Polyd. Virg. ubi supr.*

(3.) The Canonist *Gammaus*, in favour of the Apostolick See, asserts that *Annates* are very justly required by the Pope *pro Conservando decenti statu*, and compares it to *Aaron* the High Priest's receiving the Tithe of Tithes, the Tithe of such Tithes as were given to the other Priests; adding withal, that *Annates* are of very great Antiquity; *Gamma. in Extr. Julii 2. de Simon. Papæ Elect. nu. 253. in Repet. Jur. Can. To. 6. par. 2. fo. 54.* as appears by the Concessions of *Jo. Andreas*, and of *Hosiensis*; *Jo. Andr. & Hosiens. in c. inter cætera, de Offic. Ordin.* the which *Tho. Aquinas* doth not deny, saying, That it is but consonant to Natural reason, that he *qui omnium curam habet, de Communi alatur*; and thence concludes, That the Pope may require Tithes and Annates from the Clergy; *Aquin. 2. 2. quæst. 87. artic. 4.* As to the Original of these *Annates*, *Platina* and *Blondus* report them to have been first exacted by Pope *Baniface the Ninth*: Others assert it to be in the time of Pope *John the Two and twentieth*, which was above Seven-

ty years before that *Boniface*. But *Johannes Eccius* in his *Enchiridion* against the *Lutherans*, says, that both *Blondus*, *Platina*, and *Gravaminus*, whom he there nick-names (*Ecclesie Consecratorum*) were all in an Error in ascribing the Original of *Annates* to this *Boniface* or that *John*; for says he (quoting *Johannes Andreas* for his Author) in the Council at *Vienna*, *Ann.* 1311. whereof *P. Clement* the Fifth was President (which was long before *Boniface* or *John* the 22) there was a Debate concerning *Annates*; *Jo. Andreas ubi supr.* & *Gam. ubi supr.* But there supposing *Clement* the Fifth to have been after *John* 22d. was the ground or reason of their Error.

(4.) *Aumone* or *Frank Almoign* is the same which we call *Libera Eleemosyna*, or Free Alms, whence the Tenure is known by the Name, Tenure in *Aumone*, which is a Tenure by Divine Service.

(a) Britton.
fo. 164.

(a) It is a certain Tenure or Title of Lands at the Common Law, as when Lands or Tenements are freely given in the way of Alms, to some Church or Religious House, upon this condition or consideration, That Divine Service shall be offered and Prayers made *pro bono animæ Donantis*, or the like: So that this *Aumone* or *Frank-Almoign* is no other than a Tenure or Title of Lands or Tenements bestowed upon God, by giving them to such as devote themselves to the Service of God, for pure and perpetual Alms: whence the Feoffors or Donors cannot demand any Terrestrial Service from the Feoffees, so long as the said Lands and Tenements remain in their hands. (b) With this agrees the *Grand Customary of Normandy*, cap. 23. and whereof *Bracton* writes at large. (c) But *Britton* makes another kind of this *Land*, which is given in Alms, but not in Free Alms, because the Tenants in this are obliged to certain Services to the Feoffor (d).

(b) Britt. c. 66.
au. 5.
(c) Bract. l. 2.
c. 5, & 10.
vid. F. N. B.
fo. 211. &
New Book of
Entries, verb.
Frank Al-
moigne.
(d) Britt. ubi
supr.

(5.) In the Case of *Dennis* against *Drake* it was said, That if a man be Instituted to a Benefice, he ought to pay the *First-Fruits* before Induction by the Statute; but by the Common Law it was otherwise, for he is not to have the Temporalities until Induction, and therefore he could not pay the *First-Fruits*: But another person cannot be Presented to this Benefice during the continuance of the first Institution. And an Institution to a second Benefice is a present Avoidance of the first (e).

(e) In Case
Dennis vers.
Drake.
Lane's Rep.
Vid. Co. lib. 4.
Digbie's Case.
fo. 79.
Mich 5. Jac.
Col. l. 12.

(6.) *Decimæ*, *id est*, Tenths of Spiritualties were perpetual, and paid to the Pope, till Pope *Urban* gave them R. 2. to aid him against *Charles*, King of *France*, and others, who supported *Clement* the Seventh against him. And 5 H. 3. by the Pope's Bulls all Tenths were paid to H. 3. for years: These were given to the King 26 H. 8. cap. 3. Vid. *Lambert de priest.* Angl. & c. fo. 128. cap. 10. St. ibid. inter *Leges* Inæ. fo. 78. cap. 4.

C H A P. XXXI.

Of Altarage.

1. *The genuin signification of the word Altarage, what is comprehended under that word: Two Cases at the Common Law touching Altarage.*
2. *A severe Canon made by Cardinal Otho against the gross abuse of Altarage; an Artifice to defeat that Canon: And whether Altarages may be let to Farm.*
3. *Whether Tithes-Wool will pass by the word Altaragium?*
4. *The word Altaragium shall be expounded according to the use and custom of the Place.*
5. *Whether Tithes-wood may pass to the Vicar by the word Altaragium.*

(.) **A**ltarage or *Altaragium*, a word though now somewhat obsolete, yet in signification of Ecclesiastical cognizance, and in the intent thereof practicable at this day. Mr. *Blount* in his *Nomo-Lexicon* takes notice thereof as a word which comprehends not only the Offerings made upon the Altar, but also all the Profit which accrues to the Priest by reason of the Altar, *Obventio Altaris*. And for further proof and illustration of this matter, there cites a President out of the Orders and Decrees of the Exchequer in the Reign of Queen *Elizabeth* to this effect, That upon hearing the matter between *R. T. Vicar of West-Haddon*, and *E. Andrews*, it was ordered, That the said Vicar should have, by reason of the words (*Altaragium cum manso Compertenti*) contained in the Composition of the Profits assigned for the Vicars Maintenance, all such things as he ought to have by these words according to the Definition thereof made by the Reverend Father in God, *John Lord Bishop of London*, upon Conference with the *Civilians*, viz. &c. all Doctors of Law, b. e. by *Altaragium* Tithes of Lamb, Wool, Colt, Calf, Piggs, Goslings, Chicken, Butter, Cheese, Hemp, Flax, Honey, Fruits, Herbs, and some other small Tithes, with Offerings that shall be due within the Parish of *West-Haddon*. (a) The like Case was for *Norton* in *Norhamptonshire*, heard of late years in the said Court, and upon the Hearing ordered in like manner as aforesaid. Thus all Oblations, whether in Money or Bread, to such or such an Altar, either out of Devotion or Custom,

(a) Mich. 21.
Eliz. in Seac.
inter *Turner*.
and *Edwards*.

(b) Gloss. in
Matt. Par.
Blount's No-
mo. Lex. ver.
Altaragium.

from made either by the Parishioners or Strangers, are esteemed to be offered *nomine Altaragii.* (b) Under which Notion may be comprehended Oblations, Obventions, and Offerings, which in effect seem to be but as one and the same thing, and that which may be called meerly Spiritual, the Oblations being such things Real or Personal as are offered or dedicated to God and his Church, which seem to be included in Obvention; the other Profits consisting in the Tithes Predial or Personal, as also in the Glebe. *John de Aton* in his Gloss upon Cardinal *Otho's* Constitutions, describing the *Proventus ex Altari*, says, that they are Offerings either in Bread or in Money, or consisting in other minute Oblations, vulgarly called *Altaragium.* *Const. Otho. cap. Audit. verb. Proventus, Gloss. ibid.* Which word extends it self also to all things pertaining to the Altar, and relating to the Ornaments thereof, which were by the Canons and Constitutions of King *Edgar*, An. 967. to be *Mundissima & apprimè Concinnata*: Canon. 42. *Edgar. Reg. è Veterrimo M.S. Codice Saxonico, Colleg. Corp. Christi Cantabrig.* But this cannot refer properly to the word *Altaragium* otherwise than in *sensu largo*; for by the genuin signification thereof is meant only the Obventions, Oblations, and Profits of the Altar, not the Ornaments thereof.

(2.) In Cardinal *Otho's* daies, about 170 years since, this *Proventus* of *Altarage* was most grossly abused by many of the Clergy, insomuch that he made a most severe Canon or Constitution against the Offenders in that kind, for in these daies (as he observes in the Canon) these Miserable Priests (for so he there calls them) to advance the profits of their Vicarages out of their ravenous Covetousness, by the excessive gain of their *Altarages*, would admit none to their Penitential Confessions, unless they first deposited some money, in pursuance of a precedent Compact (as the *Gloss* has it) by way of a *Simoniackal* extortion, far exceeding the allowed and accustomed *Altarages* or Oblations of the Altar: And therefore, first declaring them not only unworthy of all Ecclesiastical Benefices, but also of the Kingdom of God, did Decree, That the Bishops in their respective Diocesses should make a most exact Enquiry touching this horrid abuse, and that all such as were found guilty thereof, should be removed from and deprived of the Benefices they possessed, and for the future be render'd incapable of all Ecclesiastical Preferments, and wholly suspended from their Function for ever. *Const. Otho. Ne aliquid exigatur pro Sacramentis fol. 6. verb. Audit.* Notwithstanding which there being then in use and practice another kind of *Simoniackal* Artifice to advance the excess of *Altarages*, by Letting them and other Ecclesiastical Revenues and profits of the Church to Farm, another Canon or Constitution

stitution was then also Decreed, inhibiting and forbidding all such Farms of *Altarages* in any kind for the future: Where *John de Aton* in his Gloss upon that Canon says, it was constituted for the prevention of *Simony*; and there takes the occasion to put the Question, Whether it be lawful to allow a Parochial Chaplain for his stipend the Annual Obventions of *Altarage* in whole, or in part; the Negative seems (says he) to be inferred from the Text of that Canon; but in his own opinion he is of another judgment, because it matters not, whether his Salary be paid in Money or any other Ecclesiastical thing; and concludes, that an Assignment of such *Altarages* may safely be tolerated; and that the Priest to whom *Altarages* are due, may appoint his Proctor to collect the same, and being so Collected, lawfully be assigned him for his Stipend: And although the Canon forbids the Letting to Farm the *Altarages*, and other profits of the Church, yet the Gloss holds that the Temporal Provenues of an Ecclesiastical Jurisdiction may be sold or let to Farm; but not the Spiritual Right of the Jurisdiction it self. *ibid. Constit. Nō Dign. tradantur ad firmam, verb. Ecclesias, & Gloss. ibid.*

(3.) Note, upon Evidence to a Jury, between *Brett* and *Ward* upon the dissolution of a Vicarage in the County of *Warwick*, which was part of the Priory of *Dantry*, where the Pope by his Bull gave to the Vicar *Minutas Decimas & Altaragium*. And it was certified by the *Doctors*, That *Altaragium* will pass to the Vicar Tithe-wool, &c. and the usage was shewed in Evidence, and the Copy of the Popes Bull; and the Court would not credit that without seeing the Bull it self: And so the Plaintiff was Non-suit, and the Jury was discharged. (c) *Bulla b. e. properly Vesicula aque superfluens*: But in this case a more reverend esteem was had of the Popes Bull. *Bulla* is also taken for the Boss of a Nail or Bridle: *Hinc Bulla pro Sigillo & pro obsignato Diplomate, in primis literis Pontificum plumbeo sigillo notatis. Has literas Bullam vocant, quia plumbea bulla arcentur; quemadmodum apud Romanos bulla erat Ornamentum aureum, quod jungebat vestes: Est enim bulla tumor, & ornamentum illud, hoc Bullæ nomen retinuit, quavis in figuram Cordis esset fabricatum, ut refert Macro. in 1. Satur. quare aliquoties vestis ipsa Bullata Bulla nuncupatur; ita & litera Apost. Bulla plumbi munitæ Bullæ nuncupantur. Grammar. Extra. Cum tam Divino.* (c) *Brett and Ward's Case. Winch. Rep.*

(4.) *W.* Libels against *G.* in the Ecclesiastical Court for Tithes of Wool, Wood, and Apples, &c. and he shews that he was Vicar there; and that the 8 E. 1. there was a Composition, That the Parson should have the Tithes of Grain and Hay, & præterea the Vicar should have *Altaragium*: And for that those Tithes did

not belong to the Vicar, he prayed a Prohibition. And *Henden* objected, That the Parson ought to set forth his Tithe, and not dispute the Title of the Parson or the Vicar; but the Vicar ought to come into the Ecclesiastical Court *pro interesse suo*: But notwithstanding that, and notwithstanding the Vicar refuses to claim those Tithes, and that always within memory they have been paid to the Parson, yet a Prohibition was granted: And in the end (upon the Composition) power is reserved to the Ordinary, if any doubt or obscurity be in the Composition, to expound or determine it; and if he please, to increase the part of the Vicar; and there was no power of diminution: As by *Hutton*, it is also usual in such Compositions; and they say, That the word *Altaragium* shall be expounded according to the use; as if Wood had always been paid to the Vicar by virtue of this word, so it shall continue, otherwise not: And so it had been Ruled in the Exchequer; and upon that President it was Ruled accordingly in this Court: and by them Wood is *Minuta decima*, as in the case of *St. Albans* it was Ruled (d).

(d) Dr. Wood
and Green-
wood's Case.
Heti. Rep.

Mich. 10 Jac.
B. R. Reynolds
vers. Green.
Bullst. pa. 2.

(5.) In a Trial at the Bar in an Action of Trespass, the Question arising between the Parson and the Vicar, as touching Tithe-Wood, and to whom the same belonged: As to this by the Opinion of the whole Court clearly, the Parson *de mero jure* ought to have the Tithe-Wood, if the Vicar be not Endowed of the same, or claims to have it by Prescription; but without such a Dotation or Prescription the same belongs to the Parson. Another Question was propounded for the Vicar, who entitles himself unto the Tithe-Wood by these words [*Altaragium*] and *Minuta Decima*, whether those words will carry the Tithe-Wood unto him or not: As to this, the exposition and true definition of this word [*Altaragium*] is considerable, and to whom this is due. [*Altaragium*] as was observed, is that which is due to be served at the Altar. *Williams* Justice, *Altaragium* is that only and properly which is offered at the Altar, and *Minuta Decima* are the small Tithes; also the word [*Altaragium*] will not carry Tithe-Wood: And this is the Question here, Whether the Vicar by this word [*Altaragium*] hath Title to the Tithe-Wood? *Crook* Justice. This word *Altaragium* doth not carry the Tithe-Wood, which are great Tithes, but *Minuta Decima*, which are petit small Tithes; *Minuta Decima* & *Altaragia*, the Vicar, as was urged, is to have them by his Composition, and that by these words he is to have Tithe-Wood. *Fleming* Chief Justice, There is an usage here laid in the Vicar to have the Tithe-Wood, by reason of these words, *Altaragia* & *Minuta Decima*, the which the Vicar can no ways have, but by Prescription or by such a Usage; and so the same may pass by these words *Altaragia* & *Minuta Decima*,

cima, and the Usage had accordingly : Also Sheaves of Corn have passed by Usage to the Vicar, by the words *Altaragia & Minuta Decima*, and so it was Adjudged in the Court of Exchequer. *The Judges all agreed in this*, That by these words *Altaragia & Minuta Decima*, by Usage, Tithe-wood may well pass; and so hath the Opinion of all the *Civilians* been. *Fleming* Chief Justice, and the rest of the Judges agreed in this, That by Usage, the word *Altaragia* shall be accounted *inter Minutas Decimas*. *Williams* Justice, By the word *Altaragia* Tithe-Wood doth not pass; but if the Vicar have used to have the same, time out of mind, This is good, and shall pass under the words of *Minuta Decima*. *Fleming* Chief Justice; Though the Law be against it, that Tithe-Wood doth not pass by these words, yet by Usage it hath been allowed good, to carry Tithe-Wood by these words, being of small value; and by such usage Tithe-Wood may pass, though the Law be against it.



CHAP.

C H A P. XXXII.

Of Tithes.

1. *What Tithes are ; the Original thereof in England, with the Division and Subdivision thereof.*
2. *Whether the Quotity be Moral, or only of the Ceremonial or Judicial Law? The Institution of Tithes ; the lawfulness thereof under the Gospel ; it is Sacrilege, Theft, and Robbery to withhold them.*
3. *The Common Arguments against payment of Tithes, Answered.*
4. *A fourfold Division of Tithes under the Levitical Law.*
5. *The Schoolmens conceit touching the Division of Tithes, in allusion to the Division of the Law of Moses.*
6. *Tithes anciently Ecclesiastical are now Temporal Inheritances : several Laws touching Tithes in general.*
7. *What the Common Law of England understands by Tithes ; The first obstructions thereof by Charles Martel.*
8. *The supposed reason, why Tithes before the Lateran Council might be paid to any Church or any Priest. The original Division of England into Parishes.*
9. *The Exact provision anciently, as well before as since the Conquest made by the Sovereign Kings and Princes of this Realm for due payment of Tithes.*
10. *The Supposition of the Parochial Right of Tithes to be settled by a Canon of the Council of Lateran, Contradicted.*
11. *Whether a Parson may make a Lease parol of his Tithes.*
12. *Tithes discharged by Unity of possession.*
13. *A Covenant between Parson and Parishioner touching Non-payment of Tithes.*
14. *Whether Proof by one Witness in case of Tithes ought to suffice in the Ecclesiastical Court.*
15. *Tithe-Wool, and Rotten sheep ; Tithe-Calves.*
16. *Tithe-Headlands ; Tithe-Wool ; Lamb and Wool included in Small-Tithes.*
17. *Tithe-Wool of sheep depastured in one Parish and Shear'd in another.*
18. *Suit for the Tithe-Grass of a Riding Nagg.*
19. *Modus decimandi touching Tithe-Wool, and Lamb.*

20. Park-

20. *Park-Tithes* ; Buck and Doe not tithable ; what Partridges and Pheasants are not tithable.
21. *Saffron*, whether it be *Small Tithes* ; *Venison* not tithable.
22. *Prohibition* for not allowing *Proof* by one *Wine*s.
23. *An Action* of the *Cafe* lies against a *Parson*, that takes not away in due time his *Tithe-Corn*s out.
24. The *Parishioner* not obliged to divide the *Tithes* into *Mouities*, where two persons have portion of *Tithes* by halves.
25. A *Custom* of not tithing the old *Sheafs*, good.
26. Whether *Tithes* shall be paid of the *Glebe* *Leased* to a *Farmer*.
27. Whether *Tithes* may be *Leased* or *Released* without deed.
28. A *Parson* may *Sue* in the *Ecclesiastical Court* pro modo *Decimandi*.
29. Whether that *Court* may proceed therein in case the *Modus* be denied.
30. In what case the *Right* of *Tithes* is triable in the *Exchequer*.
31. A *Cafe* in *Law* touching *Prescription*, and of *Tithes* of a *Park* *Disparked*.
32. What things are reputed *Majores*, what *Minores* *Decimæ*, and how they may vary according to the *Circumstances*.
33. Whether *Tithes* are payable of *Cattel* for the *Dairy* or the *Plough*.
34. Whether a *Dean* and *Chapter* be capable de non *decimando* their *Lands*.
35. Touching *Tithe-Herbage* of your *Cattel*, of *Hedge-stuff*, of *Orchards*, and the *Custom* of *Hearth-peny*.
36. *Tithe-Fish*, *Customary Tithe*; whether *Prohibition* or not.
37. *Acorns* tithable, if sold ; whether *Pigeons*, if spent in the house.
38. Several *Cases* touching *Discharge* of *Tithes*.
39. *Hay* of *Headlands*, whether tithable?
40. *Prescription* for discharge of *Tithes* upon payment of 10 s. per ann.
41. A *Forrest* is the *Kings Hands* is privileged of *Tithes*, not so in the hands of a *Subject*: The *Right* of *Tithes* between *Parson* and *Vicar*, triable in the *Ecclesiastical Court*.
42. Whether *Tithe* shall be paid for *Hedge-wood* and *Fire-wood*?
43. Touching *Tithes* of young *Cattel*, of *Hedging* and *Fencing* of the *Herbage* of *Heifers*, and *Horses*, of *Dry-Cattel*, and of *Gardens*; how far tithable, or not.
44. *Apples* *Stollen* out of the *Orchard*, not tithable ; no *Tithe* of *Pasture* of *Milch-kine* grown dry, unless kept for *Sale*.
45. *Composition* for *Tithes* for life ; not good without *Deed*.
46. *Estovers*

46. *Eftovers burnt in the house, not Tishable. The Heart-peny good by Prescription.*
47. *A Composition for Tithes de anno in annum.*
48. *The Modus decimandi is Suable in the Ecclesiastical Court, as well as the Tithe it self.*
49. *Prohibition in case of Libel to prove in perpet. rei memo.*
50. *Custom of Tithe-Grass Cocks as to both Mathes.*
51. *In a Prohibition upon matter at Common Law, and not with in the Stat. of 2 E. 6. 13. the Suggestion need not be proved in Six months.*
52. *Tithe-Hay of Headlands; Custom and Prescription.*
53. *Tithe-Hay of Heatlands; also Tithe of Pidgeons.*
54. *Minute Tithes to the Vicar.*
55. *Tithes to Parson and Vicar may amount but to one Action.*
56. *The Curate may not Prescribe in Tithes against the Parson.*
57. *Curates may sue for Pensions in the Ecclesiastical Court.*
58. *By the Civil Law, the Parson to have Notice when Tithes set out.*
59. *Action on the Case against a Compounder for Tithes Swung in the Ecclesiastical Court.*
60. *Modus decimandi by one may hold as to the others for a Prohibition.*
61. *Composition for one year good without Deed; not if for years.*
62. *Tithe-Hasel, Holly, Willow, Whitethorn; VVher the Parishioner shall preserve the Parsons Tithe for him?*
63. *Testis Singularis not sufficient to prove payment of Tithes in the Ecclesiastical Court.*
64. *Composition for Tithes, and a Prohibition thereon.*
65. *Tithes taken away by a Stranger after they are set out, the Parsons remedy lies at the Common Law.*
66. *In what Case no Costs upon failure of Proof of the Suggestion within the Six months.*
67. *Modus Decimandi may be Sued for in the Ecclesiastical Court; where if denied, they are to surcease.*
68. *Custom in Cornwall touching Tithes of Sea-fish.*
69. *In what Case an Agreement for Tithes for years may be good without Deed.*
70. *In what Court Tithes of Rents in London may be Sued.*
71. *A Collector of Tithes cannot License a Parishioner to carry away his Corn.*
72. *VVher Debt lies for Treble dammages upon Fraudulent setting forth of Tithes.*
73. *Tithes where they belong to the Parson or the Vicar, cognizable in the Ecclesiastical Court, where the Right of Tithes is confessed.*

74. *The Ecclesiastical Court not Judges of the Bounds of a Parish.*
 75. *Modus Decimandi in reference to a Park.*
 76. *A Fraudulent setting out of Tithes, is no setting them out at all.*
 77. *The Vicar shall have Tithe of Rape-Seed, being within a Prescription, though a new thing in England.*
 78. *What the word Garba signifies.*
 79. *Whether Wood in its own nature be great Tithes; and in what case it shall pass by the words de minutis Decimis.*
 80. *If two Tithes of Tithes unite in one person, there need but one Action for them.*
 81. *A Parson may not set a Lease for years of Tithes per parol only.*
 82. *If a Parson be disturbed in carrying away his Tithes set out, his Remedy lies properly in the Ecclesiastical Court.*

(1.) **T**ITHES [*Dismes, Dceimæ*] probably an abbreviation from the Saxon, Teopung, or Tithing, properly *Decuria* in that Language. *Lamb. Expl. of Sax. words, ver. Decuria.* That the Apostles and Elders at *Jerusalem* were competently supplied by the Contributions of the *Jewish* Profelytes is very conjecturable in that they sold their possessions, and brought the price thereof and laid it down at the Apostles feet; and such as then planted the Gospel and laboured in the Word and Doctrine, had their maintenance by the Contribution of their Converts, *Vid. Concil. Grang. Can. 7. & 8.* And *St. Cyprian* writing to the Church of *Carthage*, *Epist. 33. & 34.* to receive *Aurelius & Cellerinus*, Confessors, faith in *Epist. 34. Presbyterii honorem designasse nos illis jam sciat, ut & sportulis iisdem cum Presbyteris honorentur, & Divisiones Mensurnas æquatis quantitatibus partiantur*, Know you, that we have already designed to them the Dignity of *Presbytership*, that they might be honoured with such allowances as *Presbyters* have, and receive equal shares in the Monthly Dividends. So that *Sportulæ* were the allowances, which in this infancy of the Gospel the *Presbyters* had out of the Contributions of the Converts; and the *Fra-* Cawdry's
Discourse of
Patronage, p. 3.
tres Sportulantes mentioned by him in his *Epist. 66.* were the Clergy which received such allowance. These Converts (after the Conversion of *Constantine* the Emperour) many of them being Governours and Nobles, settled great and large Demsin-Lands upon those who Converted them; and that (according to *Mr. Selden's* conjecture) the first Oratories or places of Publick Worship, were built in the Lands bestowed on them; which first Oratories were called *Cathedrals, Sees, or Seats*, from their constant Residence

Ibid. p. 10.

thereon. That the Christian Church even in times of Persecution laid claim to Tithes as due *Jure Divino*, is partly confessed by Mr. Selden himself, citing some passages in the Ancient Fathers to that purpose. But when the Empire became *Christian*, then the Christian Clergy did more earnestly press to Donation of Tithes; and in process of time they prevailed, not only by Preaching and Cantons, but by the Edicts of Emperours and Kings, to have Tithes given to the Church. And it appears, that the *Roman Empire*, wherever it did reduce any Conquered Country *in formam Provinciæ*, appointed the Farmers of the Customs, to collect among other Impositions, the Tenth of the Tenants of the Empires; that is, of all who occupied any Land in the Conquered Province, either as immediate Tenants to the Empire, or as Sub-tenants under them. The *Publicans* therefore who collected these Tributes, were called *Decumani*, as Mr. Selden, pag. 39. of his History of Tithes doth observe out of *Appian*. But whether these Tenth were received by the Senate or Emperours, upon a Civil or Religious account, is not liquid and clear: For the Emperours always till Christianity came in (nay *Constantine* and other Emperours even after Christianity was received, till *Gratian's* time, as the Noble and Learned *Du Plessy* in his *Mysterie of Iniquity* observes out of *Zosimen*) continued the chief *Pontifice* or High-Priesthood in their own persons. And as touching us here in *England*, Dr. Heylin, P. H. Treleyny, in his Treatise touching Tithes, p. 3. saith, Tithes are not given to the Ministers by the People; for Sir Ed. Coke on *List. Tenures*, lib. 1. c. 9. Sect. 73. fol. 58. asserteth, That it appears by the Laws and Ordinances of Ancient Kings, and especially of King *Alfred*, That the first Kings of this Realm had all the Lands of *England* in *Demesn*, and *Les Grandes Mannors & Royalties* they reserved to themselves, and with the Remnant they for the defence of the Realm enfeoffed the Barons of the Realm with such Jurisdiction as the Court Baron now hath. And at this time, when all the Lands of *England* were the King's *Demesns*, that *Ethelwolph* the Second Monarch of the *Saxon* race (his Father *Egbert* being the first, which brought the former Heptarchy under one sole Prince) conferred the Tithes of all the Kingdom upon the Church by his Royal Charter. Of which *Ingulph* Abbot of *Crowland*, An. 855. saith, That King *Ethelwolph* with the consent (*gratuito consensu*) of his Prelates and Princes, did first enrich the Church of *England* with the Tithes of all his Lands and Goods. Many other Laws of the *Saxon* Kings for the payment of Tenth are recited by Mr. Selden, as entirely the Gift of Kings: And so saith King *Elred*, *Nemo auferat à Deo, quod ad Deum pertinet, & Prædecessores nostri concesserunt*. The whole Bishoprick Anciently was in a large sense a *Paræcia*, and the income of it
(by

(by Contributions first, and by Tithes also afterwards) was the Common stock of all the Clergy of the Diocess; and Mr. *Selden* asserts it to be the general Opinion of the Common Lawyers, That before the *Lateran* Council, under *Innocent 3.* every man might have given his Tithes to what Church he would (probably within the Diocess) because they were not the Propriety as yet of any one Presbyter, but the Common Patrimony of all the Diocesan Clergy. So that Tithes are a Tenth part of all increases Tithable, due to God, (a) and consequently to his Ministers that wait on the (s) *Levit. 27.* Altar. These are divided into three sorts, 1. *Prædial* Tithes, a-30. rising only either of the Fruits of the Ground, as *Corn, Hay, Hemp*, and the like; or of the Fruits of the Trees and Orchards, as *Apples, Pears*, and the like. 2. *Personal* Tithes, arising of the profits that come by the labour and industry of Man, either by Handicrafts, as *Carpenters, Masons*, and the like; or by Buying, Selling, or Merchandizing. 3. *Mixt* Tithes, arising partly of the Ground, and partly of the Industry of Man, as of *Calves, Lambs, Pigs, Milk, Cheese*, and the like. (b) No Tithes shall be paid for such things (b) *Pasch. 1.* as do not increase and renew year by year, by the Act of God. (c) *Jac. Rot. 19* Of *Prædial* Tithes some are called *Majores*, vulgarly termed the *C. B.* Great Tithes: other *Minores vel Minuta*, vulgarly the *Small Tithes*. (c) *Co. 11. Dr. Grant, 16.* The Great, such as *Wheat, Rye, Hay, &c.* The Small, such as *Mint, Cummin, Annis, &c.* (d) And commonly with us here in Eng- (d) *Roll. 636. D. Luke 11. 42.* land we compute *Flax* in the number of *Small Tithes* (which is a *Prædial* Tithes) as also *Wool, Milk, Cheese, Eggs, Chicken*, of all kinds, *Lamb, Honey, Bees-wax*, and the like, *Vid. Lindw. cap. de Decimis.* In Ancient times the Laity were so far from subtracting their Tithes, as is the common practice of these days, that oft-times they would give more then was due or demanded; and were Conscientious in the payment thereof, as at their death they usually bequeathed a *Soul-Seat* to their Parochial Priest in lieu of any Tithes forgotten; and at their Funerals caused their best Ox or Horse to be led with the Corps, and as a Mortuary or Oblation given to the Priest in recompence of any Tithes, which possibly in their lifetime might have been omitted to be paid. But in these latter Ages (not regarding what *S. Hieron* says) That *Fraudare Ecclesiam est Sacriligium*, (e) all Artifices imaginable are put in practice to subduct the Tithes; and therefore to enforce the due payment thereof were the Statutes of *H. 8.* and *Ed. 6.* made and enacted (f).

(2.) *Covarruvias*, with other Canonists and Schoolmen, holds, (f) *St. 27. H. 8. 20.* That by the *Moral Law* the rate, or proportion of Tithes is not necessarily to be the Tenth part of the Fruits; which the more received Opinion holds to be both *Erroneous* and *Mischievous*; and that by the *Law of God and Nature*, no Custom deviating from

- the exact rate and proportion of the Tenth of the Fruits ought to prevail any longer than by the free and mutual consent of Parson and Parishioner: For which reason it is supposed, That the paying of a Half-peny for a *Lamb*, or a Penny for a *Calf*, by such as have under Seven in one year, is now become an unreasonable Custom, in regard the value of such Lambs and Calves is now raised four times higher, than in Ancient times. This seems far remote from Tithes, the very *Quotity* whereof seems to be *Moral*, (g) rather than *Ceremonial* or *Judicial*; and not only allowed or approved, but even commanded by our Saviour himself: (h) Yea, by the very Law of *Nature* (which is the ground of the Moral Law, and long before the Levitical) Tithes appear to be due, in that *Abraham* paid it to *Melchisedech*: And God himself (who is the best Interpreter of his own Law) calls the detention of Tithes *Sacrilege*. (i) And that Command of Christ, affirming that Tithes ought to be paid of *all*, even to the very Herbs, spoken by him at the period of the *Levitical* Law, ought not to be restrained only to the Priest-hood of *Aaron*: for it doth now remain in force as to the Priests under the Gospel, as that other part of the Moral Law, *Thou shalt not steal*, the withholding of Tithes being expressly interpreted *Theft* and *Robbery* by the Prophet. (k) And lest it should be thought a meer Human Interest, or in the power of Man to alienate, God himself hath vouchsafed to take Tithes upon his own account in his Ministers behalf. These Tithes could not be meerly Ceremonial (as some would have it) for they prefigure nothing, nor are they repealed by any one Text in the Gospel, but reinforced as aforesaid: so that whatever was commanded in the Old Testament, and grounded on the Law of Nature, and being not repealed in the New, must yet stand in force, as a duty of the Moral Law. And if it be Objected, That Tithes were not paid in the Primitive times of the Christian Church; the Reason is, not because they were not then due, but because there was not then any such settled Order for things of this or the like nature in the Church.
- (3.) Wherefore all the Common objections made against the payment of Tithes in the Christian Church may be reduced to one of these Four: (1.) That our Saviour gave no Command to his Apostles to take Tithes, but rather on the contrary said, *Freely ye have received, freely give* — *Ans.* Yet our Saviour saith, *These things* (speaking of Tithes) *ought ye to have done*. (l) And says, *The workman is worthy of his meat*. (m) And St. Paul says, *The Labourer is worthy of his Reward*. (n) Where hath Christ *in totidem verbis* forbidden *Sacrilege*? Wilt thou therefore commit it, because he hath not *in terminis terminantibus* forbidden it? *Thou that abhorrest Idols, dost thou commit Sacrilege*? (o) (2) Tithes were
- (g) Levit. 27. 30.
(h) Matth. 23. 23 & Luke 11. 42.
(i) Mal. 3. 8, 9, 10. vid. Pro. 3. 9, 10.
(k) Mal. Ibid.
(l) Matth. 23. 23. & Luke 11. 42.
(m) Mar. 10. 10.
(n) 1 Tim. 5. 18.
(o) Rom. 2. 22.

were not paid till about three hundred years after Christ, a *Tertulian*, *Origen*, and *S. Cyprian* do testify. *Ans.* These Fathers do withal acknowledge, that during that time the Churches Maintenance was the Peoples free Contribution; which probably might have continued to this day, had not that Contribution in process of time turned into a Sacrilegious Century by Covetousness, instead of a Commanded *Decuma* as a duty Morally enjoyned. (3.) That Tithes came first into this Kingdom by the power of the Pope, as by Pope *Adrian* in the time of *Offa* King of *Mercia*, during *Englands* Heptarchy, in *An.* 786.—*Ans.* Possibly it might be so; what follows thence? does a thing lawful in it self become unlawful, because a Pope enjoyns it? what if he had commanded Alms to be given instead of Tithes? must we therefore be neither honest in payment of the one, nor charitable in giving the other, because there was a Command of the Pope in the case? (4.) That *Æthelstane*, *Edmond*, *Edgar*, *Canutus*, and *Æthelwolfe*, Kings of *England*, Ordained the payment of Tithes meerly to pacifie their Consciences, and thereby to make Atonement for their Blood-guilty Souls.—

Ans. Admit it were Historically true, yet the final Cause of any Action, or the End for which the thing is done, alters not that quality that is inherent naturally in the thing: A thing lawful in it self commanded for a wrong End, perverts the Action, not the thing: if a man gives Alms that the Poor may be drunk, though that be no Alms; yet it doth not render Alms as unlawful, nor alter that quality of Charity which is inseparable from Alms.

(4.) Tithes Anciently were Fourfold, as (1) That which the People paid the *Levites*. (p) (2) That which the *Levites* thence paid to the Priests. (q) (3) That which the *Jews* reserved for Expende in their Solemn Feasts, when they went to the Tabernacle or Temple. (r) (4) A Third years Tenth, which was then laid up for the *Levite* and the Poor. (s) The first of these is held a Natural, Moral, and Divine Tribute; the second and third Ceremonial; the fourth Judicial. The *Jews* had also their *Theruma*, which was not properly Tithes, but a second kind of First-Fruits: There were two kinds hereof, the one called the Great *Theruma*, the exact quantity whereof was not defined by *Moses*; but the Ancient Lawyers determined, that it might not be less than the fortieth, fiftieth, or at least the sixtieth part of the kinds already dress'd and prepared as *Wheat* fanned, *Oil* and *Wine*, Corn in the Ear taken from the heap and given to the Priests. (t) The other was the Lesser *Theruma*, which was, that when the former was taken away for the Priests, the rest of the Heap was Tithed for the *Levite*, the tenth part whereof the *Levites* gave to the Priests, which was called the *Tithe* of the *Tithe*, or the *Theruma* of the Tithes.

(5.) Because

(p) Hieron. sup.

Ezek. 14. 15.

& Num. 18. 26.

(q) Deut. 14.

22.

(r) Deut. 14.

23.

(s) Deut. 14.

28.

(t) Hieron.

ubi sup.

(5.) Because the Law of *Moses* hath been divided into Three parts, viz. Moral, Judicial, and Ceremonial, some of the Schoolmen have thence conceived, That *Tithes* admit the like division, whereof the *Moral* part was only a necessary Maintenance for the Minister, and therefore natural and perpetual: The *Judicial* part was the number of *Ten*, as fit only for the *Jews*, and therefore positive and remotive: The *Ceremonial* part was the Mystery contained in this Number of *Ten*, which being (as they taught) but a shadow only, was vanished and abolish'd with the Law it self; and thence inferred, that the *Quotity* or precise number of *Ten* being taken away by reason of the Ceremony, a competency now only remains for the Minister out of the *Tithes*: This conceit hath occasioned no small prejudice to the Church, although it hath no more probability of truth in it, than that whereon it is grounded, viz. That the Number of *Ten* is a type of *Christ*, and that the infeiour Digits do signifie the People. *Levi* himself paid *Tithes* to the first Priest we ever read of, that is, he paid them to *Abraham*, which being urged by the Apostle against the *Levitical* Ceremonies, argues, that they are more than merely *Levitical* and Ceremonial; indeed if we consider their assignment to *Levi's* Tribe, they are such, but not otherwise. The Sabbath and *Tithes* were both before the Law, in their very Numbers respectively, (u) and were but repeated by *Moses* under the Law, because they had been approved of God before the Law in the self-same Numbers. The Sabbath is said to have a Moral and a Ceremonial part: The Moral is perpetual and unalterable, which is, that God should have a Seventh day; the Ceremonial being Typical of our Rest in Heaven, is only positive, and not so unalterable, but that it might be (as it is) changed from the Seventh day of the Creation, to the Seventh after our Saviour's Resurrection: So *Tithes*, they also have a Natural and a Positive part; the Natural is permanent and unalterable, which is, that God hath reserved to himself a Tenth of the increase, &c. for the Maintenance of his Ministers; in which sense immediately after the dissolution of the *Jews* policy, the Christians of the Primitive Church, as soon, as they could get any outward form of a Church, and peace from Persecution, received it in the very *Quotity*: the Positive is, That the Lord annexed those *Tithes* by *Moses* to the Priests and *Levites* for their maintenance, during the dispensation of the Mysteries under the Law, and therefore changed by the Christians in the Primitive Church to the Christian Ecclesiasticks (w); so that how this *Quotity* can be changed into a Competency, seems neither demonstrable nor warranable by the Word of God, but that the *Quotity* ought to remain as a perpetual Right due to God and his Church. And if any shall argue, that *Tithes* are not

(u) Gen. 2. 3.
&c 14. 20.
&c 28. 22.
Heb. 7. 4.

(w) Dr. Ridley's View.
cap. 14. Sect. 7.

to be paid or required in a Protestant Church, because they have been ever so upheld in the Church of *Rome*; such may as well argue, they ought not to be paid in a Christian Church, because they are paid to *Mahometan* Princes, for so they are, and that because they were Priests; for every Husbandman is bound to pay for Tribute the Tenth part of all his Corn to the Patriarch for the use of the Prince, the relief of Impotent people, and Widows; and for maintenance of War against the Enemy. *Purch. Pilgr. lib. 6. cap. 1. §. 3. p. 803. nu. 10.*

(9.) *Tithes*, which anciently were meerly Ecclesiastical, are now made Temporal Inheritances; therefore are they *Assets* in the hands of the Heir, the Wife endowed of them, and the Tenant by the Courtesie shall hold them. (x) They are not grantable for life, or years, or for a longer term than one year, but by Deed. (y) They cannot be extinguished by a Feoffment of the Land, nor pass by a Devise of Lands, with all profits and commodities thereto belonging; and yet may be exchanged for Temporal Inheritances. (z) Anciently and at the Common Law there were none qualified to receive them, but either an Ecclesiastical person, or a mixt person as the King. They are not extinct by their coming into any hands, but of the Parson himself. (a) And that which is given in lieu of them is turned into a Spiritual Fee. (b) It is not paid more than once for one and the same thing in one and the same year, and that only for the neat and clear profit of the thing *Tithable*. (c) It must be paid in kind, if there be Corn now where Wood grew before, or Wood planted now where Woodlands formerly were. And the Law allows the Parson a convenient time to remove the *Tithes*; which circumstance of Time and the convenience thereof is triable by a Jury; and if the Parson exceed the Time, the Parishioner may have his Action against him as a Trespasser *ab initio* (d). And some conceive, that a Parishioner is not bound to give the Parson notice when he doth set forth his *Tithe*. (e) By the Civil Law the Parishioner ought to give the Parson Notice when the *Tithes* are set forth; but it hath been Adjudged, that the Common Law doth not so oblige a man. (f) But a severance of Nine parts from the Tenth part there must be, for such severance is so necessary; and in a kind so essential to *Tithes*, that they are not due, nor is it *Tithe* within the Statute of 2 Ed. 6. until such Severance be made. Yet the Parson may Grant his *Tithes* growing upon the Land, before Severance; which ought to be made by the Owner of the Land: for though the property of *Tithes* set out by the Owner of the Land belongs to the Parson; yet it is otherwise if they be set out by a Stranger. (g) And in case the Land be not in any Parish, then the King shall have the *Tithe* thereof by his

Preso-

(x) Co. 11. 14.

on Litt. 159.

Bulstr. 2. 184.

Hob. 250. 296.

Co. 2. 4. &c

Dod. of Ad-

versions.

(y) Latch. 176.

(z) Co. 2. 13.

(a) Dyer 43.

(b) Hob. 42.

(c) Poph. 197.

(d) Bullstr. 3.

336.

Godb. 329.

(e) Noy 59.

(f) Noy's Rep.

in Spencer's

Case.

(h) Hill. 14.
Jac. in Cam.
Scacc. Colt
vers. Glover.
Roll. Rep.

(i) Vid. Hugb
Abridg. 189.
case. 8.

(k) Dr. Bridg-
man's Case.

Noy, Rep. 31.
& Pasch. 20.

Jac. B. R. Rep.
286. & Latch.
8.

(l) 2 & 3 Ed.
6. c. 15.

(m) Pol. Virg.
Hist. Angl.
lib. 20.

(n) Holinsh.
in Hen. 2.
f. 111.

(o) Co. 11. 13.
b.

(p) Co. 2. par.
44. 44. E. 3.
by Ludlow.
7 E. 3. 5. by
Parne. Mich.
15 Jac. in C.B.
Slade and
Drake's Case.
Hob. 296. acc.
Hugb. Abr.
vers. Dismes.

Prerogative and by the Custom of England. (h) But where Land in themselves Tithable, are not manured or ploughed, specially in prejudice to the Parson, in such case he may notwithstanding Sue the Occupier thereof in the Spiritual Court for the Tithes of that Land. (i) But if the Parishioner duly set forth and serves the Tithe in convenient time, and after Damage happen to him by the Parson's not taking the same away in like convenient time, in that case the Parishioner may have his Action on the Case against the Parson. (k.)

(7.) The Common Law of this Realm takes notice of Tithes by the word [*Dismes*] (*Decima*) of the French (*Decimes*) signifying Tithe, or the Tenth part of the Annual Fruits, either of the Earth, or of Beasts, or Mans labour and industry, due unto God, and consequently to him that is of the Lord's Lot, and hath his share by his special appointment: It signifieth also the Tenths of all Spiritual Livings, yearly given to the Prince, called a perpetual *Disme*, (l) which anciently were paid to the Pope, until Pope Urban gave them to K. Richard the Second, to aid him against Charles the French King, and such others as upheld Clement the Seventh against him as aforesaid. (m) It signifieth likewise a Tribute levied of the Temporality. (n) But here it is to be understood, as *Quota pars omnium bonorum licite quasitorum, Deo Divina Institutione debita*; which though according to the Canon Law is a Tenth of Annual and lawful Encrease commanded to be paid to the Sons of Levi for their maintenance in consideration of their Ministry; yet at the Common Law it is an Ecclesiastical Inheritance collateral to the Estate of the Land, and of its own nature due only to Ecclesiastical persons by the Ecclesiastical Laws. (o) The Practice whereof never met with any considerable interruption in any Age, until Charles Martell's Sacrilegious Infeudations of Tithes, about the year 650. which ushered in such a President into the Christian World, as could never to this day grow obsolete and out of use. Notwithstanding from the beginning it was not so, nor did any Lay-persons pretend to Tithes originally, nor legally till the Statutes of Dissolution of Abbeys made them capable thereof, whereby the Tithes appropriated to such Houses of Religion as were dissolved became a Lay-Fee, and Suableness the Laity in the King's Ecclesiastical Courts.

(8.) Where in the Books of the Common Law it is Reported, That before the Council of Lateran, every man might give his Tithes to what Church he pleased, and might have bestowed them upon what person he thought best; there it is also asserted for reason, That before that Council there were no Parishes, nor Parish-Priests that could claim them. But by a Canon made in that Council, every man is since compellable to pay his Tithes to the Parson or Vicar of that Parish where the Tithes arise. (p) Here may arise a question, whether there

there were not Parishes long before any Council at *Lateran*? For admitting that the 2d *Lateran* Council was held in the year 1120. as *S. Tho. Ridley* computes it (q), or that the general Council of *La-* (q) View. par. *teran* was held in the year 1179, as *Sir Simon Degge* calculates it (r), 3. cap. 4. §. 5. yet there seems to be a division into Parishes some Centuries of years (r) Law of Tithes, cap. 2. before either of these: For it is said, That Cities and Countries were p. 147. divided into several Parishes by an Ordinance of *P. Dionysius* about the year 266 (s), and from him derived into this and other Realms: (s) Ridl. ibid. Also, that Ecclesiastical persons first in this Kingdom made Divisions par. 3. cap. 2. of Parishes, as appears by our own Chronicles (t); and that the first Sect. 4. practice thereof came from *Honorius* the 4th Archbishop of *Can-* (t) Registr. *terbury* after *Augustine*, who died in the year 693 (u). And such as Ecclef. Christi. Cant. Stow. have followed the course of Antiquity in this matter, conceive that Ridl. ibid. the original of Parishes had its precedent from the practice of some (u) Ridl. ibid. ancient *Roman* Bishops, it being (as some would have it) recorded in the *Pontifical* of *Damasus*; but in *Anastasius's Bibliothec.* it is found, That when *Peter* had appointed and ordained Priests, &c. and *Cletus* had reduced them to a certain number, *P. Euarista* assigned to each of them his Parish; and as to the time when those Parishes were assign'd by *Euarist*, it must be about the beginning of the 2d Century, which was many Centuries before the C. of *Lateran*, as also was the practice thereof here in *England* by *Honorius*, as aforesaid, the truth whereof is approved by *Cambden*. But *Cavendum*, &c. saith *Marsil* in his Book *De Red. Eccl. c. 12*. heed must be taken as to the word *Parish*, for it is equivocal, having various acceptations, as sometimes when nothing is named but a Parish, the whole Diocesis is understood, which notion of the word often occurs in the Councils; in which sense *Barbaria* spake a wide word for the Pope in his *Treat. de praest. Card.* when he said, *That in respect of his Holiness, the whole World was but one Parish*. Sometimes a Parish is taken for such a part of the Diocesis, as was assign'd to some Priest, arbitrarily sent and maintained by the Bishop; to whom such a Parish paid all their dues, and he to his Clergy, about which time this custom was introduced, that all Church-dues should be at the Bish. disposal to be divided into 4. portions, whereof he should have 1 part for himself, another for his Clergy, a 3 for the Poor and Strangers, and the 4. to be reserved to the Parishioners for the repairing of Churches, the collection of which dues was committed to the care of the *Chorepisc.* from which *Quadripartite* division probably came that custom whereby the Bishop of every Diocesis might before the C. of *Lateran* make distribution of the Tithes within his Diocesis, where he thought convenient to Spiritual persons, for their necessary maintenance (x) If the original of a Parish in the 2 former acceptations were a device of the ancient *Rom. B.* and from them derived to other Nations, then probably from the inconveniencies thereof might be

(x) Bede, lib. 1. cap. 28.

the beginning of a Parish as it is taken for such a part of the Diocese, as is limited to some Residentiary Incumbent, allowed by the Bishop, and maintained by the Church-dues in his own Right; which consideration of a Parish seems most of all agreeable with those which we now have, and were in use with us before *Edgar's* daies, as appears by the *Saxon Laws* of that time.

Vid. *Edgar's*
Laws cap. 1.

(9.) The Ancient Kings and Sovereign Princes of this Realm, both before and since the Conquest, have ever made special Provision for the due payment of Tithes unto the Church, and that ever since there was any Church-Government in this Land; witness that Law made before the Conquest by King *Ætblestane*, That every man should pay his Tithes in manner as *Jacob* did, that is, of all that God should give him. The like did King *Edgar* and King *Edmund* command upon pain of Excommunication. And about the Seventh Century *Ina* King of the *West-Saxons* made a Law, That the Church-Sceat be paid at *Marilemass*, on pain of paying twelve times as much in case of Refusal: this Church-sceat, *Fleta* interpreteth Church-feed, and therefore calls it *Corta mensura bladi Trisici, &c.* Others read Church-scet, that is the Church-shot or Church-due: Also the said King *Ætblestane* in the Ninth Century made a Law by the Advice of *Wulfelme* his Archbishop, and his other Bishops, Commanding all his Reeves throughout all his Kingdom in the Lords name, and of all Saints, that in the first place they pay the Tithes of his own Revenues, as well in Living Cattel as the yearly Fruits. Likewise King *Edmund* at a Synod holden in London, at which *Oda* and *Wulfstan* Archbishops, and many other Bishops were present, made a Law, Commanding all Christian men by their Christianity to pay Tithes, Church-sceat, and Alms-fee; if any refuse to do it, let him be accursed. This Alms-fee or Alms-mony was that, which was called the *Peterpence*; for when *Ina* the *West-Saxon* King went in Pilgrimage to *Rome*, he made it a Law to his Subjects, That every House should pay a peny to the Pope; and this was to be tendred at *St. Peters-tide*, as appears by *Edgar's Laws*. nu. 4. In the Laws also of King *Edgar* it was Decreed in the first place, That Gods Church should have all her Rights, and that every man should pay his Tithes to the Elder Minister (or Mother-Church) where he heareth the Word, cap. 2. of *Edgar's Laws*. And in the Eighth Chapter of King *Knutes* Law it is Ordained, That care be taken rightly to pay Gods Rights every year, viz. the Plough-Arms fifteen Nights after *Easter*, the Tithes of young Cattel by *Whitsontide*, and the Fruits of the Earth by *Allhallontide*; otherwise, the Kings Reeve, and the Bishop may take the Tenth part whether he will or no, and give it to the Minister whereunto it belongeth. Also by the Laws of *Edward* the Confessor, nu. 8. & 9. it was De-

Decreed particularly, that Tithes should be duly paid *De Garba, Græge Equarum, Pullis, Vaccis, Vitulis, Casæ, Lactæ, Vellis, Porcellis, Apibus, Bosæ, Præto, Aquis, Molendinis, Porcis, Vivariis, Hoveden, par. 2. cap. de Decim. Eccles.* *Piscariis, Virgultis, Hortis, Negotionibus*, in a word, *omnibus rebus*, quas dederit Dominus; which Decree was afterwards ratified by the Conqueror. Afterwards King Edward the First at the Petition of the Clergy, established the Articles of the Clergy, which his Son Ed. 2. Confirmed by his Letters Patents under the Great Seal, and by Consent of Parliament, at the Petition of the Clergy in the Ninth year of his Reign. And by the Statute of 1 R. 2. cap. 14. it is Acknowledged, That the Cognizance of Tithes of right doth, and of Ancient time was wont to pertain to the Spiritual Court. Also the Cistercians, who had purchased Bulls from the Pope to be discharged of Tithes, in the Second year of H. 4. were by Act of Parliament after reduced to the state they were in before. And in the Fifth year of H. 4. it was Ordered, That such as held Lands belonging to any Friars-Aliens, should pay all manner of Tithes to the Parsons and Vicars of the Parishes wherein the same were, notwithstanding their being seized into the Kings hands, or any Prohibition to the contrary: For before the dissolution of Monasteries, &c. by King H. 8. Lay-men were not capable thereof, nor indeed after the Dissolution, notwithstanding the Statute of 27 H. 8. c. 20. could the people be well brought to pay their Tithes to the Lay-Purchasers thereof, not qualified to sue for the same, until the Statute of 32 H. 8. c. 7. enabled them to Convent the Refusers before the Ordinary or other competent Judge, according to the Ecclesiastical Laws, without the Reserve of any cognizance for the Temporal Judge therein, otherwise than as to what refers to the Inheritance or Freehold of such Tithes, or in case of disseisin thereof; which was not only ratified and confirmed by a subsequent Statute made in the time of Edward the Sixth, but it was also then Enacted, That the Tithes should be paid as the Usage or Custom had been within forty years next before, and that under certain penalties and forfeitures in case of detention or subtraction (and of treble Damages in some cases) the party so subtracting to be prosecuted in the Spiritual Court according to the Kings Ecclesiastical Laws.

(10.) Sir Simon Degge in his late useful Treatise, entitled *The Parsons Counsellor*, par. 2. Or *Law of Tithes*, cap. 2. discovers a vulgar Error touching the Original Settlement of the Parochial Right of Tithes: For whereas it is frequently said in the Books of the Common Law, That before the General Council of Lateran every one was at liberty to give his Tithes to what Spiritual or Ecclesiastical or Religious person he pleased, and that the Parochial Right thereof

10 H. 7. 18.
41 E. 3. c.
Dr. & Stud.
c. 55.
Co. 2. 44. b.
Dyer 84, &c.

Seld. Hist. De-
cim. 231.
Co. 2. par. Inf.
641.

was settled by the said Council; he says, there is not any Canon of that Council to any such purpose, whereby the Parochial right of *Tithes* was settled: Nor could it then be, for that the said Council was in *An. 1179.* but the Parochial Right of *Tithes* was not settled till the year 1200, and then not by any Canon, but by a Decretal Epistle of Pope *Innocent* the Third, a Brief whereof he there inserts out of Mr. *Selden* and Sir *Ed. Coke*. If this were an Error in them, it was so also in *Lindwood, c. locat. & conduct. verb. portion.* But possibly not such an Error in either as is conceived: for whether the Canon for the settling of Parochial Right of *Tithes*, made in the Council of *Lions, 1274.* were an Original Decree, or only a Confirmation of some former Canon to the same effect or not, clear it is, that the said Decretal Epistle of *P. Innocent 3.* obliged only the Province of *Canterbury*, to whose Archb. it was directed: *Lindw. c. nuper. Abbat. de Decim.* And in the Second *Lateran* Council, holden *An. 1120.* (being nigh 60 years before that abovesaid) it was Decreed by the said *Innocent 3.* That the Religious persons, viz. the *Cisterians, Hospitallers, Templers,* & those of *S. Johns of Jerusalem* (which by the Popes *Pascal & Adrian* were exempted from payment of *Tithes*) should pay the same unto the Parochial Incumbents, whereby a Parochial Right of *Tithes* is settled by a *Lateran* Council.

Sir Tho. Ridley's
View of, &c.
par. 3. c. 4. Sect.
5.

'Case of Tithes
per parol.

(11.) At the Common Law its seems a Parson cannot make a Lease *Parol* of his *Tithes*, but may discharge them *per parol*; for in *Bellamy's* Case against *Baltrop* it was Ruled by *Doderidge, Jones,* & *Whitlock* Justices, That where the Defendant in a *Traver. & Conversion* of certain Loads of *Fetches*, justified under the Lord *Clare* by a Demise *per parol* for *Tithes* of Grain for one year made in *April*, that the Lease was not good, but altogether void; but the Parson may discharge the Parishioner of *Tithes per parol* or Lease the Rectory consisting of Glebe and *Tithes per parol* for years (a).

(a) Mich. 2.
Car. Rot. 179.
Bellamy vers.
Baltrop.
Latch Rep.
Tithes, where
discharged by
Unity of Pos-
session.

(12.) In *Skelton's* Case against the Lady *Airie* it was said that it was Adjudged *Mich. 34 & 35 Eliz.* That a perpetual union of the Parsonage, and the Land charged, is a sufficient discharge of the *Tithes*, and a Prescription may be well enough to be discharged of the payment of *Tithes*, as it appears by a Case put in the Archbishop of *Canterbury's* Case, *Coke lib. 2. G. Crook* Counsel *à contra* conceived that a perpetual Unity was no perpetual discharge, and said there was no Judgment given in the Case cited before; he also cited 10 H. 7. or 6. where the manner of *Tithing* is set down; he also cited the Bishop of *Winchester's* Case, *Coke lib. 2.* also the Prior of *D.* to be Resolved in 40 *Eliz.* That a Copyholder may Prescribe to be discharged of *Tithes* by pleading, That he was always Tenant by Copy to a Spiritual Corporation: and he said, That it was Adjudged in *Sheddington's* Case, That if a man Prescribe to be discharged

charged: of payment of *Tithes* by reason of payment of (another kind of *Tithe*, that this is not good (b).

(13.) The Parson of D. Covenanted with one of his Parishioners that he should pay no *Tithes*, for which the Parishioner Covenanteth to pay to the Parson a certain Annual Sum of money, and afterwards the *Tithes* not being paid, the Parson sued him in the Ecclesiastical Court, and the other prayed a Prohibition: And it was agreed, That if no Interest of *Tithes* pass, but a bare Covenant, then the party who is sued for the *Tithes* hath no remedy, but a Writ of Covenant: And the better opinion of the Court in this Case was, That this was a bare Covenant, and that no Interest in the *Tithes* pass (c).

(14.) In *Warners Case* against *Barrat* in the Ecclesiastical Court, it was said of *Richardson*, That before the Stat. of Ed. 6. the proper Suit for *Tithes* was there, and if they allowed not one Witness to prove payment, a Prohibition shall be granted. And he put *Morris* and *Eaton's Case* in the Bishop of *Winchester's Case*: where it was Ruled, if the Spiritual Court will not allow that Plea, which is good in our Law, a Prohibition lies, as in case of *Tithes* (d).

(15.) It was moved for a Prohibition; because a Parson had Libelled against a Parishioner for *Tithe-wool* of *Rotten-sheep*, which he ought not to have, because he shall have *Tithe* for the same thing at Shearing-time afterwards; as where *Tithe* is paid for the Cuttings of Grass, it shall not be afterwards paid for the After-math. It seemed otherwise to *Doderidge* and *Jones*, because it is for the same thing there, but here the Parson hath no recompence for the Wool. And *Jones* said, That if the Parishioner sell Sheep, the Parson shall have allowance of the *Tithes* thereof after the shearing; and upon this point a Prohibition was denied. Secondly, there is a Custom, that if a Parishioner have three Calves he shall pay a penny for the *Tithe* thereof; if seven Calves, then one Calf. The Parson sued for one Calf, because the Parishioner had three one year, and four another, and for that he had no *Tithe* for the first three. And thereupon a Prohibition was granted (e).

(16.) In *Huddleston and Hills Case* it was said, That if a man Sue in the Ecclesiastical Court for *Tithes* of *Headlands*, the Defendant may have a Prohibition: but he ought then to suggest, That they are but small *Headlands*, and that there is a Custom of Discharge in consideration that he paid *Tithes* in kind of Meadows. And in this case *Williams* said, That if a man keep Sheep in one Parish until shearing time, and then sell them into another Parish, in this case the Vendee shall pay the *Tith-wool* to the Parish where they were depastured in the greater part of the time of the growing of the Wool. (b) And in the Case of one *Nicholas* and *W. Ward* it was agreed, That *Tithe* Lamb and Wool was included within Small *Tithes* (c).

(b) *Skelton* and the Lady *Aries Case*. *Lanes Rep.*

A Parson Covenants, that his Parishioner shall pay no *Tithe*.

(c) *Pasch*. 16. *Jac. B. R. Fulcher v. Griffin*. in the Additions to *Poph. Rep.*

(d) *Warner* against *Barrat*. *Hecl. Rep. Tithe-Wool and Rotten Sheep.*

Tithe-Calves.

(a) *Anonymus*. *Latch. Rep. Headlands:*

Tithe-Wool. (b) *Huddleston and Hills C. Lane's Rep. Lamb and Wool included in Small Tithes.*

(c) *Ward's C.*

(17.) In

(17.) In *Hunoo Regis* a Prohibition was prayed, because a Parson had Libelled in the Ecclesiastical Court for the tenth part of a Bargain of Sheep, which had depastured in the Parish from *Michaelmas* to *Lady-day*: and the party surmised, that he would pay a Tenth of the Wool of them, according to the Customs of the Parish. But the Prohibition was denied; for as *Daderidge* Justice said, By this way the Parson shall be defrauded of all, if he shall not have his Recompence, for now the Sheep are gon to another Parish, and he cannot have any Wool at this time, because it was not the time of sheering. *Nota, per VWhidock, de animalibus inutilibus*, the Parson shall have the Tenth part of the Bargain for Depasturing, as Horses, Oxen, &c. But *de animalibus Utilibus*, he shall have the Tithe in *specie*, as Cows, Sheep, &c. (d).

(d) Michael

2 Car. B. R.

Poph. Rep.

Tithes for a Riding Nag.

(18.) The Rector of the Church of D. Libelled in the Ecclesiastical Court for the Tithes of a Riding-Nag, where the Case was, That a man let his Land, reserving the running of a Horse for some time, when he had occasion to use him there: The Defendant shewed this matter in the Court by his Council, and prayed a Prohibition, and averts that for the same Land in which the Horse went, he paid Tithes. And by the Court, nigh *London*, a man will take 100 or 200 Horses to Grass; now he shall pay Tithes for them, otherwise the Parson shall be defeated. But in this Case, if the Defendant alledge and prove that it was a Nag for labour, and not for profit, a Prohibition lies (e).

(e) Trin. 15.

Jac. B. R.

Larking and

Wild's Case.

Poph. Rep.

Tithes of Wool and Lamb.

(19.) In the Case of *Bowry* against *Wallington* where *W.* had Libelled in the Ecclesiastical Court against *B.* for the Tithes of Wool and Lamb, and *B.* upon suggestion of a *Modus Decimandi* obtained a Prohibition, and had an Attachment, and declared upon it, and are at issue upon the *Modus*, which is found for the Defendant, and Consultation granted; whereupon Judgment was given in the Ecclesiastical Court against *Bowry*, upon which *B.* appealed, and prayed a new Prohibition; and *Noy* moved for a Consultation; because that a Prohibition and an Attachment upon it were but one Suit, for the Contempt of the party in bringing his Suit in another Court, and translating this from the Kings Court, and when it is once Tried for the Defendant, the same thing shall not be Tried again. Note, That in this case upon the Statute of 50 E. 3. 4. it was agreed by the Court, That a Prohibition awarded, and afterwards Consultation granted, that upon the same Libel no Prohibition shall be granted again; but if there be an Appeal in this Case, then a Prohibition may be granted, but with these differences, (1) if he that Appeals pray the Prohibition, there he shall not have it; for then Suits shall be deferred in infinitum in the Ecclesiastical Courts. (2) if the Prohibition and Consultation were up-

Where several Prohibitions may be granted in the same Case and where not.

on the body of the matter, and the substance of it, for otherwise he shall be put many times to try the same matter (f).

(20.) The Lord Rich was seized of *Hadley Park*, and of all the Tithes thereof, and payed for the Tithes but one Buck in the Summer, and a Doe in the Winter for 30 years past. The Park was disparked and turned into arable Land, and the Parson would not receive this Fee-Buck and Doe, but would have Tith-Corn, and thereupon sued in the Ecclesiastical Court, and he brought a Prohibition. And *Castlin* said, That he need not pay other Tithes but Buck and Doe; for although they be not Tithable, yet may they be paid by Composition, and he may not take them, but they are to be delivered to him: And in like manner Partridges and Pheasants in a Garden are not Tithable, yet may they be paid in lieu of Tithes, and shall be brought dead to the Parson; and although there be no Park, yet may he give a Buck out of another Park, and perhaps it may be made a Park again (g).

(21.) The Case was, A Church in which there had been a Parson and Vicar time out of mind, and the Parson used to have the Great Tithes, and the Vicar the Small, and for the space of forty years last past, it was proved that the Parson had Tithes paid him out of a Field of twenty acres of Corn, and now the Field is sowed with Saffron, and the Vicar sued for the Tithes of Saffron in the Ecclesiastical Court, and the Parson had a Prohibition. *Coke*, I conceive the Parson shall have Tithes, for by the Statute of 2 H. 6. it is Enacted, That Tithes shall be paid as hath been used the last forty years, and this hath been always Tithable to the Parson, and although the ground be otherwise employed, yet the Parson shall have the Tithes: And so it was in *Norfolk* in the case of a Park, where the Parson prescribed *pro modo Decimandi* to be paid 3s. 4d. for all Tithes arising out of the said Park, and although the Park was afterwards converted to Arable, yet no other Tithes shall be paid. *Popham*, It hath been adjudged otherwise in *Wrot's Case* in the Exchequer. But the Law is clearly as hath been said; and the difference is, when the Prescription is to pay so much money for all Tithes, or when the Prescription is to pay a Shoulder of every Buck, or a Doe at *Christmas*; for there if the Park be disparked Tithes shall be paid, for Tithes are not due for Venison, and therefore they are not Tithes *in specie*. And I conceive, that Tithes of Saffron-heads shall be comprehended under Small Tithes; and although the Tithes of this Field have been paid to the Parson, yet it being converted to another use, whereof no gross Tithes do come, the Vicar shall have the Tithes: And so if arable Land be converted into an Orchard, the Vicar shall have Tithes of the Apples; and so if the Orchard be changed to Arable, the Parson shall have Tithes. *Quod Fenner concessit* (h).

(f) Pasch. 1.

Car. B. R.

Bowry varf.

Wallington in

the Additions

to *Poph. Rep.*

Tiths of Park.

Buck and Doe

not Tithable.

What Partridges

and Pheasants

not Tithable.

able.

(g) Trin. 31.

Eliz. post

Winter and

Lovedais Case.

Owen's Rep.

Tithes of Saffron

Tithes of a

Park

Venison not

Tithable.

Saffron is small

Tithes.

(h) Pasch. 38.

Eliz. B. R.

The Case of

the Deah and

Chapter of

Norwich.

Owen's Rep.

(22.) In

(22.) In one *Hawkin's Case*, Libel was in the Ecclesiastical Court for Tithes for Lambs for seven years. And there he proved payment by one Witness, and a Prohibition was granted for Non-allowance of that Proof (i).

(i) *Warner*
against *Burrit*.
Hedl. Rep.

Tithe-Corn.

(23.) On the Stat. of 2 Ed. 6. c. 13. for setting out of Tithes, the Case was this: Corn was set out for Tithes, and the Owner of the Land took the Corn *Damage fesant*; but in the Declaration it is not shewn *how long* the Corn remained on the ground. And by the Court, it is not good, inasmuch as it doth not appear that the Owner of the Land had any Damage at all, for he doth not shew *how long* the Corn remained on the ground. And the usual course in such cases is, if Tithe be set out, and the Parson take it not away in due time, the party shall have an Action on the Case. By the Court, a man cannot distrain *Shocks* of Corn, but he may distrain a *Stack Damage fesant*. But in this case it is not shewn how long it remained on the ground, and therefore it doth not appear that he was damnified. And so after the Tithe is clearly set out, the Parson may by the Statute have an Action of Trespass, if any take them away; but if only a meer Stranger set out the Tithe, that settles no property in the Parson, so as that he cannot have any Action for the taking thereof away (a).

(a) Hill. 1 Car.
1. B.R. *Stilman*
vers. *Chanor*.
Latch. Rep.

(b) *Case Stil-*
man vers. *Cre-*
mer.
Latch. Rep.

(c) *Dist. Caf.*
in alia Narrat.
Latch. fo. 228.

No Tithe of odd
Sheaves.

(d) *Anonymus*.
Latch. Rep.

(24.) It seem'd clear to *Noy*, That if Two persons have portions of Tithes by halves in one Parish, the Stat. of Ed. 6. that appoints Tithes to be set out, doth not in that case oblige the Parishioner to divide the Tithes by halves, and to set out their parts singly; but the Parishioner ought only to set out the Tenth, inasmuch that if the Tithe be of one Lamb, the Parishioner cannot divide it (b). And it hath been Adjudg'd, that the Parishioner is not bound to divide the Tithe into Moieties, but the Parsons shall divide it between themselves (a).

(25.) *Noy* surmized against a Libel for Tithe-Sheaves, that the Parishioners are at the charges to bind the Corn in Sheaves, and for the better dividing thereof they use to make it up into Sheaves; and when it was made into Shocks, they put thereof into a Stack for the Tithes. And for that the Parishioners have been at this pains, they have used to be discharged of Tithes for the odd Sheaves, when they will not make a Stack. Adjudg'd a good Custom: and a Prohibition was granted, because the Parishioners therein do more than of Common right they are obliged unto (d).

(26.) The Case touching Tithe of Glebe-Land, Reported (as

Stile

Stile did Let the said Glebe, being twenty four acres, to *Miles* for years; rendering thirteen shilling four pence Rent: and in a Prohibition the Case was, if Tithes were to be paid. And *Wray* said, That although it was parcel of the Glebe, yet when it was Leased out, Tithes ought to be paid without question: But there may be a doubt where the Rent is reserved to the true value of the Land; but here the Rent is of small value, wherefore Tithes shall be paid also. And the Reservation of the Rent was *Pro omnibus exactionibus & demandis*; yet the Justices took no regard of these words. But *Godfrey* said, that those words would discharge him: But *Wray* on the contrary, for that this Tithe is not issuing out of the Land, but is a thing collateral; and if a Parson do Release to his Parishioners all demands in the Land, yet Tithes are not thereby Released; for such general words will not extend to such a Special matter (e). (e) Case *Stile*

(27.) *A.* Parson of *B.* in consideration of 120*l.* paid by *C.* one against *Miles* of his Parishioners, did accord and agree with him, That he and Owens Rep. his Assigns should be discharged of Tithes during the time that he should be Parson. *C.* made a Lease to *D.*—*A.* did Libel against him for Tithes, and *D.* pray'd a Prohibition upon the said contract. And if this were sufficient matter for a Prohibition, was the question, because it was by word only, and without writing, which amounts only to a Cause of Action upon a Promise for *C.* but no Action for his Lessees: neither can this amount to a Release of Tithes; for as Tithes cannot be Leased without Deed, so they cannot be Released or discharged without Deed. *Gawdy* Justice, Tithes cannot be discharged without Deed, unless by way of contract for a Sum of money, and he cited the 21 H. 6. 43. *Fenner*, for that year in which the Discharge was made, it was good by way of Discharge without Deed, because the Parson for that year had as it were an Interest; but such Discharge can have no continuance for another year for default of a Deed: and so a promise being no Discharge it is no cause of a Prohibition. But *Gawdy* held as afore. And the Court (*Popham* succeeding *Wray* Chief Justice, upon his death) held, that the Agreement being by parol, was not good: and *Fenner* then said, That without writing the Agreement could not be good between the parties, but for one year. And the Court awarded a Consultation. But upon search made no Judgment was entred in the Roll (f). (f) Pasch. 5. E. lix. B.R. *Wood.*

(28.) Note, That in *Laytons* Case it was said by the Court, That a Parson may sue *pro modo Decimandi* in the Ecclesiastical Court. As if a Parishioner will not put his Tithes into Cocks, when he ought by the Custom so to do. But then the Suit ought to be Special for not putting it in Cocks, and not generally for not setting forth the Tithe (g). (g) *Layton's* Case. Latch. Rep.

*Modus Deci-
mandi.*

(b) *Clark verſ.
Prouſe.
Latch, Rep.*

*Modus Deci-
mandi.*

(c) *Pafch. 7.
Jac. in the
Exchequer,
Cateſbie' Cafe.
Lane's Rep.
Preſcription.
Tithes of a Park.*

(29.) It was likewiſe agreed by the Court in *Clark's* caſe againſt *Prouſe*, that the Eccleſiaſtical Court may take cognizance of a *Modus Decimandi*: The Caſe was this; *Clark* a Parſon ſued *Prouſe* one of his Parſhioners, *per mod. Decimandi* in the Eccleſiaſtical Court, and alledged a Cuſtom in his Bill (ſo called in the Report) to have two ſhillings of the pound for every Houſe and ſhop in the Town: and upon that Suit the Defendant there answered to the Cuſtom, *Quod non credit eſſe verum*. And ſo to have here a Prohibition it was alledged, that the Defendant was a Butcher, that ſet open Stall in the Market only to ſell Fleſh there, and that he had not any other Shop or Houſe. And it was argeed by the Court, that a Parſon may ſue *per mod. Decimandi* in the Eccleſiaſtical Court: But if it be denied, the Chief Juſtice, as alſo *Jones*, ſaid, that in that caſe they could proceed no further, becauſe they cannot try matter of Preſcription there, and if they proceed, a Prohibition: but in this Caſe the Prohibition was denied, becauſe *Doderidge* ſaid, that for the Reaſons *ſupra*, power is given to the Spiritual Court to examine that matter, becauſe it is not a denial of the Preſcription, but it ought to be by Allegation (b).

(30.) It was ſaid in *Cateſbie's* Caſe, that if a Copyholder of the Kings Mannor pretendeth Preſcription for a *modus Decimandi* againſt the Parſon, the Right of Tithes ſhall be tried in the Exchequer, and a Prohibition was granted to the Eccleſiaſtical Court in this Caſe (c).

(31.) In *Pool's* Caſe againſt *Reynold*, Preſcription to have Deer out of a Park in diſcharge of all Tithes, and after the Park is diſparked; *P.* brought a Prohibition againſt *R.* the Surmiſe was, that *de temps d'ont memory*, &c. within the Pariſh of *C.* there was a Rectory appropriate, and the Chappel of *S.* annexed therewith. *Et una Vicaria perpetua ejusdem Eccleſie de C. datat.* And whereas the ſaid *P.* for ſix years laſt paſt had occupied one Houſe, 100 acres of Land, 20 of Meadow, 40 of Paſture, called *Shute-Park* within the ſaid Pariſh of *C.* which ſaid Tenements were anciently a Park, and now diſparked, &c. and converted into the ſaid Houſe, 100 acres, &c. And that all the Occupiers of the ſaid Park *de temps d'ont memory*, until the Diſparking had paid to the Vicar there, one Buck of the Summer-ſeaſon, and one Doe of the Winter-ſeaſon, &c. in diſcharge of all Tithes of the ſaid Park, until the Diſparking; and after the diſparking in diſcharge of all Tithes of the ſaid Tenements, which they had accepted for all the time aforeſaid until the Diſparking and after, or otherwiſe agreed with the Vicar for them; and traivered this Preſcription, and ſound for the Plaintiff. In Arreſt of Judgment it was moved by *Hendon*, that this Preſcription extends to the Land *quatenus* it is a Park, and that being

being destroyed, the Prescription is gone, &c. and if it be to be paid or delivered out of the Park, then it is determined. *vid. Lutterel's Case, Coke lib. 4.* Also this Prescription is against the benefit of the Church, and shall not be enlarged; and the Wood which is sold out of the Park, shall not be discharged. *14 Jac. Conyer's Case in C. B.* Prescription, that the Parson had to acres of Meadow given in discharge of all Tithes of Hay-ground, *viz.* of all the Meadow in the Parish: if any Arable Land be converted into Meadow, it extends not to discharge that. *vid. Lutterel's Case, Coke lib. 4. fo. 86.* That an Alteration in prejudice to the Parson determines the prescription. *vid. Terringham's Case, lib. 4.* He which hath Common purchased part of the Land, all is extinct, for it is his own Act: but *vide* the principal Case in that of *Lutterel* adjudged, that building of new Mills in the same place, and converting of Fulling-Mills into Corn-Mills, alter not the Prescription: And he cited a Cause which was in this Court argued at Bar, and afterward at Bench, between *Cooper* and *Andrews*, *Mich. 10 Jac. Res. 1023.* for the Park of *Coxburgh*. *Vid. 32 E. 1. Fitz. Annuity. 240. 5 E. 2. Fitz. Annuity 44. 20 E. 4. 14 E. 4. 4.* But this Case was adjudged for the Plaintiff, *Quod stet. Prohibitio*: and that which is by the name of *Park* is for the *Land*, and is annexed to the Land by the name of *Park*; if the Prescription had been to pay a Buck or a Doe out of the *Park*, then it would alter the Case: But it is General, and had been paid also after the *Park* disparked. And the Case of *Cooper* and *Andrews*, was a Shoulder of every third Deer that was killed in the *Park*, and two shillings in Money, and that Case was never Adjudged (*d*).

(32.) *V.* brought Trespass against *T. Clerk*, Vicar of *A.* for taking *Bona & Catalla*, and counts for the taking of two *Carectas*, *glaci Anglice Wood*: And upon not guilty pleaded, the Jury gave this Special Verdict, *viz.* for the Mowty of a Load of Wood, *Si videbitur Curia quod Decima glaci non sunt Minuta Decima*, then the Defendant Not guilty; but *Si sunt Minuta Decima*, then he is Guilty. This Case was argued at Bar by *Bridgman* and *Henden* Serjeants: And the Court Unanimously agreed, that for ought that here appears, this Verdict being found without any Circumstance, that this Wood shall be taken to be *Minuta Decima*. It was agreed by *Henden*, that if it had been found Wood growing in a Garden, then *Minuta Decima*. And it was agreed by the Court, that it might have so been found, that it should be *Majores Decima*, and *Prædial*; as if the profits of the Parsonage consist of such Tithes. And so of other things, which in their own nature are *Minuta* may become *Majores*, if all the profit of the Parish consist therein: As in some Countries, a great part of the Land within the Parish,

Prescription.
Tithes of Hay-ground.

Tithe of Mills.

(d) Mich. 10.
Jac. C. B. Rot.
641. Pool.
vers. Reynhold.
Hutt Rep.
Tithe-Wood
What things
are Small
Tithes, and
what Great.

is Hemp, or Lime, or Hops; there they are great Tithes, and so it may be of Wool and Lambs, *Pasch. 3. Jac. B.R. in Bedingfield's Case*, Farmer to the Dean & Chapter of *Norwich*, who had the Parsonage Improprite, and had used to have Tithes of Grain and Hay, and the Vicar had the Small Tithes: And a Field of 40 Acres was planted with Saffron: and it was Adjudged, That the Tithes thereof belong to the Vicar. There was a Case in this Court, as it was

Tithe-Saffron.

Tithe-Hops.

Tithe-Weild.

vouched by *Henden 3. Jac.* between *Portman* a Knight and another: And the Question was for Hops in *Kent*, and Adjudged that they were great Tithes; but as for Hops in Orchards or Gardens, these were Resolved to belong to the Vicar as small Tithes. There was a Case in the Court for Tithe of *Weild* which is used for Dying, and that was in *Kent*, and it was sown with the Corn, and after the Corn is reaped, the next year without any other manurance, the said Land brings forth and produces *Weild*: And that was a special Verdict, whether the Vicar shall have the Tithe of it, or the Parson; but one of the parties died before any Judgment. And if *Tobacco* be planted here, yet the Tithes thereof are *Minutæ Decimæ*: And all these new things, viz. Saffron, Hops, Weild, &c. if it doth not appear by material circumstances to the contrary, shall be taken as *Minutæ Decimæ*: And so this Case was adjugd. for the Defendant (e).

(e) Hill. 21.

Jac. Rot. 705.

C. B. Udal

vers. Tindal.

Hut. Rep.

(33.) In the Case of a Prohibition, in case of a Libel in the Ecclesiastical Court for the Tithes of Cattel; the Plaintiff alledged that those Cattel, of which Tithes were demanded, are for his Dairy and for the Plough; and *Winch* being only present said, That the Parson shall not have Tithes of such Cattel; but if he breed up Cattel to sell, it is otherwise. Secondly, the Plaintiff in a prohibition alledged, That time beyond memory the Parishioners had paid a half-peny for the Tithe a Calf, and a peny for a Cow; and that upon a day limited they use to bring this to the Church, and to pay this to the Vicar, and now the Vicar had Libelled in the Ecclesiastical Court against them to compel them to bring it home to his house: And *Winch* said, That this is no occasion of a Prohibition, for they agree in the *Modus*, but vary in the place of payment, and this is not matter of substance, and for that reason no prohibition will lie (f).

(f) Trin 26.

Jac. C. B. post.

Case *Whitgift*

vers. Sr. Fran.

Burrington.

Winch. Rep.

(34.) *B.* brought a Prohibition against *C.* and alledged, that the Dean and Chapter of *D.* was seized of the Mannor, and the Defendant being Vicar sued in the Ecclesiastical Court to have Tithes, & shewed, that time beyond Memory, &c. they had held that Discharged of Tithes for them and their Tenants, & that they let that to the Plaintiff. And it was moved by *Henden* Serjeant, That the Dean and Chapter are a body Politick and Temporal, which are not capable of this Prescription *in non Decimando*, *Coke 2.* the B. of *Winchester's Case*. *Hobart* said, That the Dean & Chapter are a

Body

Body Spiritual, and are annexed to the Bishop throughout all England; and if the Bishop is capable of that, as it is plain he is, then the Dean and Chapter is also capable of that, which was granted by *Hutton*: but *Winch* doubted, for he said, That he may be a Layman, and for that the Plaintiff ought to aver, That he is a Spiritual person: *Hutton* confessed, That the Dean may be a Layman, as was the Dean of *Durham* by special License and Dispensation of the King; but that is rare, and a Special Case, and is not common, and general, and therefore not to be brought as an Example, which was also granted by *Hobart* Chief Justice; and upon that day was given over to the Defendant to shew cause wherefore the Prohibition shall not be granted (g).

(35.) A. Libelled against W. in the Ecclesiastical Court for the Herbage-Tithe of young Cattel, scil. for a penny for every one. And *Hitcham* moved for a Prohibition: and said that he ought not to have Tithes, if they are young Beasts brought up for the Cart or Plough. And so it hath been Adjudged: As if a Parson prescribes to have Tithes for Hedgingstuf, he cannot, because that preserves the Land out of which he had Tithes; and then a Parson Libels for Tithes of an Orchard, for that it was a young Orchard; and the Custom of the place was, to pay 4 d. for one Orchard. *Hitcham* said, there is not any such difference between old and new Orchards; for if the Custom be that he shall pay 4 d. for every Orchard, it will reach to the new Orchard. And then he Libels for a Hearth-peny, for the Wood burnt in his House. *Hutton* said, The Hearth-peny is more doubtful; for it is a Custom in the North parts to give a Hearth-peny for Estovers burnt; for which he prescribes to be free of every thing which comes to the Fire. And in some parts by their Custom they had Pasturage for the tenth Beak, on the tenth part of the Gains, which is Barren for the time. But *he* and *Telverton*, who only were present, that no Tithes are due for them without Custom. *Hitcham*, they also will have Tithes for a thing before it comes to perfection, which would be Tithable afterwards. But I agree, if he sells them before they come to perfection, that the Parson shall have Tithes. But by *Hutton* and *Telverton*, there may be a Custom to have every year a penny for them. See adjournatur, &c. (h).

(36.) A. Libels in the Ecclesiastical Court for Tithes of Fish, which is due merely by Custom, and the Defendant pleads, That time out of mind, &c. they have paid no Tithes of that. And *Henden* Serjeant moved for a Prohibition. And *Richardson* Replied and said, It is merely a Customary Tithe, as Rabbits, &c. whereof no Tithes are due by the Law of the Land, and a Prohibition shall not be granted. But all the other Justices affirmed, That there shall be a Prohibition granted, because

(g) Pasch. 21.

Jac. C. B.

Bird's Case.

Winch. Rep.

Tithes of Cattel.

Tithes-Hedgstuff.

Tithes-Orchard.

Tithes-Hearth.

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beginning that the Custom ought to be tried at the Common Law, and they make a difference between *Modus Decimandi*, which is also Customary, and where there is a Tithe precedent due, and that *Modus* converts it into another duty: There no Prohibition shall be granted; but it shall be tried in the Ecclesiastical Court; whether there be such a *Modus Decimandi* or not; and that Case in the Custom makes the Duty itself. But if he alleged the *Modus* to be four pence, and the Parson for three pence, it shall be tried by the Common Law. And they said, that so was the opinion in the great Case of *Lead-Ore*. And *Hutton* said, that so it was determined in the Case of one *Berry*, for Tithes of *Lime-kills*, which are as *Minerals*, and are not Tithable by the Common Law. But when the Custom is tried, then they in the Ecclesiastical Court may proceed upon it.

(i) Fifth
3 Car. C. B.
Case of Tithes
in *Hatley's Rep.*

(37.) A Parson Libels in the Ecclesiastical Court for Tithes of Pidgeons and Acorns: And the Defendant prayed a Prohibition; because the Pidgeons were spent in his own house, and the Acorns swept from the Trees, and his Hogs eat them. And it was said by the Court, Acorns are Tithable: 1 Rep. 49. but then they ought to be gathered and also sold. And a Prohibition was clearly granted.

(k) Tithes of
Pidgeons and
Acorns, *Ante*
Wilcock's Case
in *Hatley's Rep.*

(38.) *R. Farmer* of a portion of Tithes for five years, without Deed, Demises a Farm which he had in the same Parish to *F.* for years; and afterwards he Libels against him in the Ecclesiastical Court for the Tithe of that Farm. And *F.* said, he was not Farmer. And *Hepburn* prays a Prohibition; for that, (1) That the Lease for Tithes is without Deed: but he may be discharged of his own Tithes without Deed, as was adjudged before in this Court. (2.) The Lessee is not to pay Tithes for the Farm; for although the Parson makes a Lease of the Glebe for years, he paid Tithes: But if a Lay-man who had the Impropriation Leases the Glebe, the Lessee doth not pay Tithes: But the Court denied the Case of the Lease of the Parsonage Impropriate; and said, that the Case of *Parkins* and *Hinde* was adjudged to the contrary in that very point. And also if he purchase other Lands in the Parish (which are discharged of Tithes in his hands) and he Demises them, yet the Lessee pays him Tithes. And the Opinion of the Court was, If one contract with the Parson for Discharge of the Tithes of his Lands for years, and Demises his Lands to another; yet he shall not have Tithes, but the Discharge runs with the Land. But if one take a Lease of his Tithes by Deed, and makes a Demise of his Land, he hath Tithes of the Lessee. And the Direction was, that the Lessee of the Farm ought to shew expressly in the Ecclesiastical Court, that the Farmer had not a Lease by Deed: and a Prohibition was granted.

Discharge of
Tithes.

granted. And it shall be Admitted, that the words of the Libel be-
ing *Exempta, Consecrata, & Consecrata* was good? (1) *Barth a.*

(39.) *W. against S.* in a Prohibition, in which *S. Libels* for Tithes against *Frank* of Hay. And *W.* suggests for a Prohibition, that he used to pay the Tithes for Hay in specie, in consideration whereof he used to be discharged of all Doles, Green-skipps, and Headlands, not exceeding the breadth that a Plough or a Team might turn about the Land. And *Howden* moved for a Consultation; for that it is said, in the Libel, that *in circa terris arabilibus*, when the truth is, there are skipps at the side of Lands, as broad as the Lands themselves; and then he would be discharged of them also; whereas it ought to be at the end of the Headlands only. *Richardson* said, that in arable Lands inclosed, Pasture is at the end and at the sides, which is mowed, and yet discharged of Tithes. But the Court in respect there was a Prohibition granted, said, that he ought to joyn Issue or Demur upon the Declaration (m).

(40.) The Earl of *D.* had a Mannor in the Parish of *C.* which extended to *L.* where there is a Chappel of East; and the Vicar of *C.* Libels for Tithes in the Ecclesiastical Court, against one of the Tenants of the Mannor. And *Howden* moved for a Prohibition, for that the Earl prescribed, that he and all his Tenants should be acquitted of all the Tithes of Land within *L.* paying 1000. per ann. to the Chaplain of *L.* And he said, that such a Prescription is good, as it was Adjudged in *Bowles* Case. And a Prohibition was granted (n).

(41.) In *Comyn's* Case it was agreed by the Court, that a Feoffment in the hands of a Subject shall pay Tithes; and it was agreed, that in the hands of the King it is Priviledged. And by *Richard de Venport*, and *Abbot's* Serjeants, it is only his personal Priviledge, which extends to the Lessee of the King, but not to the Feoffee. And it was agreed, that where the right of Tithes comes in question between a Parson and the Vicar, who are both Ecclesiastical persons, it shall be tried by the Ecclesiastical Court. But *Richardson* said, the Books make a doubt, where it is between the Servant of the Vicar and the Parson. But it seemed to him to be all one (o).

(42.) *N. and D.* Plaintiffs against *H. Vicar of S.* in a Prohibition: the Libel was for Wood employed in Hedging and for Fire-wood: Issue was joyned, that there was in the Parish a great quantity of Land inclosed; and that they used to take Wood for Hedge-wood and Fire-wood, and they were discharged of Tithes in consideration that he paid Tithes in kind of Hay and Corn, &c. And it was found for the Defendant. *Crawley* moved, that a Consultation cannot be granted, for that they ought to be acquitted of Tithes for those of

(1) *Barth a.**Frank.**an. Hect. Rep.**Tithes Hay of**Headlands.*(n) *Mich. j.**Car. C. B.**Wood against**Symms Hect.**Rep.*(n) *The Vicar**of Chesham's**Case.**Hect. Rep.**Tithes of Forest*(o) *Comyn's Case**Hect. Rep.**Tithe Hedg-wood**and Fire-wood.*

of Common Right; and for that although Prescription was alledged, it is nothing to the purpose. *Richardson*. For Fire-wood it was granted that Tithe always was paid. *Richardson*, there is no doubt but the discharge also ought to be by Custom, and to be grounded upon *Modus Decimandi*. *Yelverton* and *Croke* otherwise, that it is not upon *Modus Decimandi*, but by the Common Law; and the Reason is, for that when a man is Owner of Arable Land, and he pay Tithe-Milk and Corn, and for that they are discharged of things consumed in the House, which are to make Masters and Servants fit to manure the Land, &c. *Richardson* said, It is seen that it shall always be discharged, in consideration it is alledged, how a small Consideration will serve. *Croke*, It is not *Modus Decimandi*, but the Discharge is for that, that the Parson hath by them a benefit; for he had by them better means of Tithes. *Hutson*, If a man had a House of Husbandry, and demises all the Land but the House, he shall pay Tithes for them absumpt in the House. *Croke*, Not. No profit is made by them to the party; but the Parson had a benefit by him. And a day was given to search Presidents.

(p) *Patch*. 4. (p) To eno King. (p) In Hands of the King. (p) 101 2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25 26 27 28 29 30 31 32 33 34 35 36 37 38 39 40 41 42 43 44 45 46 47 48 49 50 51 52 53 54 55 56 57 58 59 60 61 62 63 64 65 66 67 68 69 70 71 72 73 74 75 76 77 78 79 80 81 82 83 84 85 86 87 88 89 90 91 92 93 94 95 96 97 98 99 100 101 102 103 104 105 106 107 108 109 110 111 112 113 114 115 116 117 118 119 120 121 122 123 124 125 126 127 128 129 130 131 132 133 134 135 136 137 138 139 140 141 142 143 144 145 146 147 148 149 150 151 152 153 154 155 156 157 158 159 160 161 162 163 164 165 166 167 168 169 170 171 172 173 174 175 176 177 178 179 180 181 182 183 184 185 186 187 188 189 190 191 192 193 194 195 196 197 198 199 200 201 202 203 204 205 206 207 208 209 210 211 212 213 214 215 216 217 218 219 220 221 222 223 224 225 226 227 228 229 230 231 232 233 234 235 236 237 238 239 240 241 242 243 244 245 246 247 248 249 250 251 252 253 254 255 256 257 258 259 260 261 262 263 264 265 266 267 268 269 270 271 272 273 274 275 276 277 278 279 280 281 282 283 284 285 286 287 288 289 290 291 292 293 294 295 296 297 298 299 300 301 302 303 304 305 306 307 308 309 310 311 312 313 314 315 316 317 318 319 320 321 322 323 324 325 326 327 328 329 330 331 332 333 334 335 336 337 338 339 340 341 342 343 344 345 346 347 348 349 350 351 352 353 354 355 356 357 358 359 360 361 362 363 364 365 366 367 368 369 370 371 372 373 374 375 376 377 378 379 380 381 382 383 384 385 386 387 388 389 390 391 392 393 394 395 396 397 398 399 400 401 402 403 404 405 406 407 408 409 410 411 412 413 414 415 416 417 418 419 420 421 422 423 424 425 426 427 428 429 430 431 432 433 434 435 436 437 438 439 440 441 442 443 444 445 446 447 448 449 450 451 452 453 454 455 456 457 458 459 460 461 462 463 464 465 466 467 468 469 470 471 472 473 474 475 476 477 478 479 480 481 482 483 484 485 486 487 488 489 490 491 492 493 494 495 496 497 498 499 500 501 502 503 504 505 506 507 508 509 510 511 512 513 514 515 516 517 518 519 520 521 522 523 524 525 526 527 528 529 530 531 532 533 534 535 536 537 538 539 540 541 542 543 544 545 546 547 548 549 550 551 552 553 554 555 556 557 558 559 560 561 562 563 564 565 566 567 568 569 570 571 572 573 574 575 576 577 578 579 580 581 582 583 584 585 586 587 588 589 590 591 592 593 594 595 596 597 598 599 600 601 602 603 604 605 606 607 608 609 610 611 612 613 614 615 616 617 618 619 620 621 622 623 624 625 626 627 628 629 630 631 632 633 634 635 636 637 638 639 640 641 642 643 644 645 646 647 648 649 650 651 652 653 654 655 656 657 658 659 660 661 662 663 664 665 666 667 668 669 670 671 672 673 674 675 676 677 678 679 680 681 682 683 684 685 686 687 688 689 690 691 692 693 694 695 696 697 698 699 700 701 702 703 704 705 706 707 708 709 710 711 712 713 714 715 716 717 718 719 720 721 722 723 724 725 726 727 728 729 730 731 732 733 734 735 736 737 738 739 740 741 742 743 744 745 746 747 748 749 750 751 752 753 754 755 756 757 758 759 760 761 762 763 764 765 766 767 768 769 770 771 772 773 774 775 776 777 778 779 780 781 782 783 784 785 786 787 788 789 790 791 792 793 794 795 796 797 798 799 800 801 802 803 804 805 806 807 808 809 810 811 812 813 814 815 816 817 818 819 820 821 822 823 824 825 826 827 828 829 830 831 832 833 834 835 836 837 838 839 840 841 842 843 844 845 846 847 848 849 850 851 852 853 854 855 856 857 858 859 860 861 862 863 864 865 866 867 868 869 870 871 872 873 874 875 876 877 878 879 880 881 882 883 884 885 886 887 888 889 890 891 892 893 894 895 896 897 898 899 900 901 902 903 904 905 906 907 908 909 910 911 912 913 914 915 916 917 918 919 920 921 922 923 924 925 926 927 928 929 930 931 932 933 934 935 936 937 938 939 940 941 942 943 944 945 946 947 948 949 950 951 952 953 954 955 956 957 958 959 960 961 962 963 964 965 966 967 968 969 970 971 972 973 974 975 976 977 978 979 980 981 982 983 984 985 986 987 988 989 990 991 992 993 994 995 996 997 998 999 1000

(p) *Car. C. B.*
Norton and
Duckett's Case.
Heil. Rep.
Tithe of young
Cattel.

Tithe of Hedging & Fencing.
Tithe of Heifers, Herbage.

Tithe of Herbage for Horses.

(p) *Harvey*. If a Libel be for Tithes of Hedging and Fencing, there a Surmise ought to be made to discharge that. But when it is for Tithes of Heifers, which in apperency ought to be spared by the Law of the Land, otherwise it is, &c. *Richardson*, for the Herbage of those Heifers Tithe is due by the Ecclesiastical Law; and we never can take Tithe of them without expresse Custom or other Recompence. *Harvey*, There was a Case, 16 *Jac. C. B.* A Parson sues for the Herbage of Horses, and the Parsonier alledged, that he kept them for the carrying of Coals; there he ought to surmise something to be Discharged: and if he alledge, that he kept them in his House for serving of Husbandry, the other may alledge, that he

he kept them to carry Coals, and the Allegation is Traverſable. *Richardſon*, There was a Caſe, where the Queſtion was, A Huſbandman keeps a Horſe to ride up and down about his buſineſs, Whether he ſhall pay Tiſhe for the Herbage of him? and a Prohibition was in that Caſe granted; but a Surmize ought to be made. *Crook* ſaid, that in the Kings Bench he had twenty times ſeen a Prohibition granted in ſuch caſes, without any Surmize. And a Libel is for dry Cattell; if it be alledged, that they are kept for the Plough; the other may alledge, that he keeps them to ſell, without that, that he keeps them for the Plough. And before there is any profit of them, it is not reaſon that they ſhould be Tithable, and the Parſon ſhall have the benefit for them after. And for Hedging it is *Lex terræ*, that he ſhall pay no Tithes. *Richardſon*, It is *Lex terræ ne conſuetudo loci facit legem terræ*. And if he had uſed to pay Tithes for the Cattell or for Hedgings, he ought not to pay that ſtill: If an Ignorant man will pay Tithes for thoſe things, and after upon a Libel a Prohibition is granted; if the other does not alledge a Cuſtom, the Prohibition ſhall ſtand: or if they alledge a Cuſtom, which is found againſt him, no Conſultation ſhall be granted. And for a Garden-peny, the reaſon of that is apparent: for otherwiſe Tithes ſhall be paid *in ſpecie*: And ſo for Hearth-peny, if he had always paid it, it ought to be paid. *Hutton*, If a man had an antient Garden for which he paid a Peny, and that is enlarged, of that enlargement Tithes ought to be paid *in ſpecie* (9).

Tithes of Herbage for a Riding-Horſe.

Tithes of dry Cattell.

Tithes of Hedging.

Garden-Tithes.

(9) Paſch. 4. Car. C. B. *Thornill's Caſe*. Heil. Rep.

(44.) *A*. Libels againſt *B*. in the Eccleſiaſtical Court for the Tithes of two pecks of Apples, and for Feeding the Cattell upon the Ground. The Defendant for the Apples answered, that there were Two pecks only growing in his Orchard, and that they were ſtoln, and never came to his uſe; and for the Cattell, that they were Ancient Milch-Beaſts, and that they growing old were dry: And that for a month they depaſtured with other Heifers, and that after they put them into Meadow, out of which the Hay was carried; and afterwards he fed them with Hay in his Houſe. *Aſhowe*, becauſe that the Answer was not admitted, prayed a Prohibition. *Hutton*. If Apples are upon the Trees, and taken by a Stranger, ſhall the Parſon be hindred of his Tiſhe? *Yelverton*, If I ſuffer one to pull my Apples, the Parſon ſhall have Tithes; but if they be taken by perſons not known, the Parſon ſhall not have Tithes of them; which was granted: For they are not Tithable before plucking; and for that, if he ſuffer them to hang ſo long by negligence after the time, that they are imbezeled, by *Yelverton* he ſhall pay Tithes. For the ſecond matter it was agreed by the Court; and for the depaſturing in

Tithe-Apples.

Tithe-Herbage of Cattell.

No Tithes of
Pasture of
Milch-kine
grown dry, un-
less kept for
sale.

67) Case upon
a prohibition.
in *Hetley's Rep.*
post *Cas. Regis*
vers. Archb of
Canterbury.

Composition
for Tithes.

Tithes-Wood.

the Meadow, and for the Hay with which they were fed afterwards Tithes shall not be paid, because that the Parson had Tithes of them before. But if the question be for the Tithes when they went with the other Hofferers, by *Crook*, that is no cause to excuse the Tithes. *Hartrey*, If I have Ten Milch-kine, which I purpose to reserve for Calves, and they are dry, the Parson shall not have Tithes for their Pasture; but if I sell them, by which it appears I kept them for Eating, there Tithes shall be paid. And *Hutton* agreed, that although there was so small a time, that they went with the Hofferers, yet Tithes shall be paid for their Pasture during that time (r).

(45.) In *Walsingham* and *Stone's* Case it was said by *Hutton* that a Paritioner compounding for his Tithes for his life, was not good without Deed: And it was said by *Yelverton*, that the use in the Kings Bench is, that if a Defendant in a Prohibition dies, his Executors may proceed in the Ecclesiastical Court; and it may be a Rule for the Judges in that Court to proceed also. And then the Plaintiff may, if he will, have a new Prohibition, against the Executors, &c.

(46.) In *Norton's* Case *Finch* Recorder said, *de Communi jure* for *Estovers* burnt in an house, Tithes ought not to be paid; by the Common Law there was not any Tithes paid for Wood: And although the Statute of 25 E. 3. gives a Prohibition for Timber, yet Under-woods were discharged of Tithes. *Vid. Dr. & Stud.* 171. It is exprest that *Estovers* are not Tithable, because they are not renewing every year, and it is parcel of the Inheritance, for to destroy all the Underwoods is Waste, &c. *Dawley's* Case was resolved for the *Wild* of *Suffex*, and *Mitch* 13 *Fac. B. R.* in the Case of *Potter* and *Dyke* for the *Wild* of *Kent* of the same prescription, Resolved to be good; and so is the Common Experience, that a whole County may prescribe so. And the reason is, for that by the Common Law it was not due; but by the Constitution of *Wincelsay*, *Lindwood* 104. it was Ordained to be paid; for then the Prelates imputed a great Rebellance that was; for the negligence of paying Tithes, and appointed Tithes of Wood. And the Commons were desirous to have the Statute of *Sylva*, &c. otherwise explained than the Clergy declares it; for they say, that they ought not to pay Tithes of any Wood that is of the growth of ten years. *Hutton*, Wood is Tithable in their nature, and then there may be a Custom to discharge them. And the Case of *Heath-peny* cannot be answered; for if he sues for the peny, a Prohibition shall not be granted, *quod concessum fuit per Crook & Yelverton*. But of things not Tithable, Tithes of them cannot be sued without alledging a Custom. *Crook*, It is known that *Heath-peny* is good by Pre-

scription:

scription: This Case is when there is not Land belonging to the House, so that the Parson is not answered for his Tithes another way. But when there are Ten Servants kept for the maintaining it, then by the Law of the Land it appears that Tithes ought not to be paid; although Custom had been alledged it is nothing to the purpose, As if a Custom be alledged to pay 4 *d.* for every Acre in discharge of Tithes, and the Verdict find 3 *d.* no Consultation shall be granted. *Hutton*, the Herbage of Barren Cattel is Tithable, because there is a Custom which discharges those that are for the Cart. And he said, that the Custom only makes that *Legem terræ*. And he cited Dr. *Graunt's* Case: He Libels for Tithes of a House, and the party brought a Prohibition, and alledged *Modum Decimandi, &c.* And it was alledged in Arrest of Judgment, that Houses were not Tithable *de Communi jure*, and yet a Consultation was granted, &c. (1).

Hearth-peny,
what.

Tithe Herbage
of Cattel.

(47.) A Case between *Stone* and *Walsingham* having been formerly in the Court touching Tithes, the Case was again moved in Court, which was that they agreed *de anno in annum* so long as the one should be Parson, and the other Parishioner, *Si ambobus partibus tam diu placuerit*, he should retain his Tithes for 6 *s.* 8 *d.* per An. And *Richardson* Justice said, and it was not denied, That the Suggestion is naught for the uncertainty of it; and a Prohibition cannot be granted upon that. For the words *de anno in annum* make an Estate for a year; and the next words make an Estate for Life; and the last words, but an Estate at Will: and what shall be Traversed here? It appears, that for years it is good without Deed, but not for life; and if it be but at Will, when the other demands his Tithes, the Will is determined. But at another day the Suggestion was made, that he made several Agreements with his Parishioner, that he pay 6 *s.* 8 *d.* for his Tithes for four years. And then a Prohibition was granted. *Harvey*, suggests, If an agreement be proved for these four years (1).

(1) Trin. 4.
Car. C. B.
Norton's Case.
Hert. Rep.

(48.) *Scot* moved for a Prohibition, that whereas he had twenty Acres of Wheat, and had set out the tenth part for Tithe; the Defendant pretending that there was a Custom of Tithing, that the Owner should have fifty four Sheaves, and the Parson five, and so he sued for Tithes, for that there was no such Custom. And the Court said, that the *Modus Decimandi* must be sued for as well in the Ecclesiastical Court as for the Tithe itself: And if it be allowed between the parties, they shall proceed there; but if the Custom be denied, it must be tried at the Common Law. For if it be found for a Custom, Consultation must be granted; if not, then the Prohibition is to stand (u).

(1) *Stone* a-
gainst *Wal-*
singham.
Hert. Rep.

(u) *Scot* a-
gainst *W.*
Hert. Rep.

(49.) *Napper against Steward*, the Parson had a Prohibition against divers of his Parishioners that Libelled in the Ecclesiastical Court, to make proof by Witness of divers manner of Tithing in *perpetuam rei memoriam* (w).

(w) *Napper against Steward*
Hert. Rep.

Custom of Tithes
Grass-Cocks.

(50.) A Prohibition for *H.* against *E.* Farmer of the Rectory of *S.* and prescribed, that all Tenants and Occupiers of Meadow had used to cut the Grass, and to strow it abroad, called tettering, & then gathered into Wind-rows, and then put it into Grass-Cocks in equal parts without any fraud; to set out the Tenth-Cock great & small to the Parson, in full satisfaction as well of the first as of the latter Math: Upon Traverse of the Custom it was found for the Plaintiff; and exception was taken, that the Custom was void, because it imports no more than what every Owner ought to do, and so no recompence for the two Maths: But the Court gave Judgment for the Plaintiff; for *Dismes* naturally are but the Tenth of the Revenue of any Ground, and not of any Labour and Industry: Where it may be divided, as in Grass it may, though not in Corn; and in divers places they set out the Tenth Acre of Wood standing and so of Grass: And the Jury having found his form of Tithing there, it is sufficient: and the like Judgment upon the like Custom was in the Kings Bench, *Pascb. 2 Jac. Rot. 191, or 192. inter Hall & Symonds* (x).

(x) *Hill. 4 Car. B. Hide against Ellis*
Hert. Rep.

(y) *Johnson's Case*
Hert. Rep.

Tithe-Hay

(51.) In *Johnson's Case*; if a Prohibition be granted upon matter at Common Law, as upon a personal Agreement between Parson and Parishioner for his Tithes, and not upon matter within the Stat. of 2 E. 6. 13. the Suggestion shall not be proved within the Six months as the Statute limits, and as it is agreed by the whole Court (y).

(52.) The Defendant here in the Prohibition Libels for Tithes of Hay in the Ecclesiastical Court. The Plaintiff suggests that the Hay was growing upon *Greenships, Deals, and Headlands*, and that there is a Custom, that the Parishioners in a Meadow there used to make the Tithe-Hay for the Parson, and in consideration of that to be discharged of all Tithes of Hay growing *ut supra*; & also that for the Hay of the Land, no Tithe ought to be paid of such Hay, but does not averr, that that Hay was growing upon *Greenships, &c.* And an Exception was taken by *Henden*: (1.) That the Exception is double; the Custom, and the Common Law: And by *Richardson*, That is not material; for you may have twenty Suggestions to maintain the Suggestion of the Court: but *Richardson* was against that, that a Suggestion might be double here, for the Suggestion of the Common Law is a Surplusage: As in *Farmer and Norwich's Case* here lately, One Prescribes to be discharged of Tithes, where the Law discharged him, and so was discharged by the Com-

mon

mon Law. The 2. exception is, that he doth not apply the Custom to himself in the Suggestion; for he that lays the Custom does not shew that the Hay grew upon the Skips, upon which a Plough might turn it self; and for this cause by the whole Court this Suggestion is naught. And here *Richardson* moved, how that two should joyn in a Prohibition. *Yelverton*, if they are joyned in the Libel, they may joyn in the Prohibition, and that is the common practice of the Kings Bench. *Richardson*, The wrong to one in the Ecclesiastical Court by the Suit, cannot be a wrong to the other. *Hutton*, They may joyn in the Writ, but they ought to sever in the declaration, to which *Harvey* agreed. *Yelverton*, The Prohibition is the Suit of the King, and he joyns tant. as in a Writ. *Richardson*, But it is as the suit of the party is, and if any joyn here, I think good cause of a Consultation. It is against the profit of the Court to suffer many to joyn. And it is usual in the Case of Customs of a Parish in debate, to order proceedings in the two Prohibitions, and that to bind all the Parish and Parson. And it was said by them all, that the consideration of making Hay is a good Discharge, because it is more than they are bound to do (z).

(53.) *F. sued V.* for Tithes of Hay, which was upon Land that was Heath-ground, and for Tithes of Pidgeons. And by *Richardson*, If it was mere wast ground, and yield nothing, it is excused by the Statute of payment of Tithes for seven years: But if Sheep were kept upon it, or if it yield any profit, which yield Tithes, then Tithe ought to be paid: As the Case in *Dyer*. And for the Pidgeons, which were consumed in the House of the Owner, he said, and for Fish in a Pond, Conies, Deer, it is clear that no Tithes of them ought to be paid of Right; wherefore then of Pidgeons? *quod nemo dedixit*, And a day was given to shew cause wherefore a Prohibition should not be granted. And the Court agreed, that it was Felony to take Pidgeons out of a Dove-house. And afterwards a Prohibition was granted, but principally, That the Pidgeons were spent by the Owner. But by *Henden*, they shall be Tithable, if they be sold (a).

(54.) *P. the Vicar of Eaton in the County of Oxon, Sues. C. the Parson* Improprate in the Ecclesiastical Court in *Oxford pro Minutis Decimis. C. sues a Prohibition* against the Vicar upon a surmize of a Prescription. *P.* comes and pleads the first Endowment made *An. Dom. 1310*, by which the Minute Tithes were allotted to the Vicar: *C. demurrs*; and Adjudged for the Plaintiff, for the Parson cannot prescribe against the first Endowment (b).

(55.) In Debt upon the Stat. of 2 E. 6. for not setting out of Tithes, the Plaintiff declares, that the Defendant was seized of the Lands in question within that Parish, and that the Tithes did belong

(z) Hill. 3. Car.
& Pasch. 4. Car.

Rot. 454.
Wood and Car-
verner's Case
ag. *Symonds*.
Heti. Rep.
Tithe Hay on
Heath.
Tithe-Pidgeons.

(a) *Flower ag.*
Vaughan.
Heti. Rep.
Prescription.

(b) Tr. 2 Jac.
B. R. rot. 520.
Pringe verl.
Child.
Noy's Rep.

For not setting
out of Tithes.

belong to the Parson and Vicar (*viz.*) Two parts to the Parson, and the third part to the Vicar, or their Farmers, payable *in specie* for 40 years last past, that the Plaintiff was Farmer proprietary of the Tithes to the Parson and Vicar *spectant*, and shews the value of the Tithes due, and demands the treble value; the Defendant pleads *Nihil debet per part.* and it was found for the Plaintiff. It was now moved in arrest of Judgment, because the Plaintiff ought to have brought two Actions, as the Parson and the Vicar ought for their several parts: But Resolved, that the Action is well brought; for it is personal and one entire Debt for one wrong

(c) Pasch. 3.

Jac. Br. Sir
Rich. Champion
vers. Rob. Hill:
Noy's Rep.
Prescription.

(d) Bott ag. Sir,
Ed. Barbaton
Noy's Rep.

(c).

(56.) Bott sues a Prohibition against Sir Edward B. and suggests that the Defendant is Parson Improprate of W. and that time out of mind there hath been a Curate or an Incumbent by the appointment of the said Rector, who administered the Sacrament, &c. And that the Custom of that Parish time out of, &c. was that the Curate should have all Tenths renewing within that Parish, except *Decimas granorum*, which were paid to the Parson, and that every parishioner who had so paid the Tenths to the Curate, was discharged against the Parson. And that notwithstanding that, &c. Sir Edward B. had sued him, &c. And now he prays a Prohibition, and had it, but after that surmise was adjudged insufficient, without argument by the Court, and a Consultation granted, for such Curate cannot prescribe against his Master, that may remove him at his pleasure: And for that reason it was not a good Prescription for the parishioners (d).

(57.) Goodwin being Vicar sues in the Ecclesiastical Court the Dean and Chapter of Wells, being Parson of a Church, for a pension, and they pray a Prohibition, and it was denied: For that pension is a Spiritual thing, for which the Vicar may Sue in the Spiritual Court. Note, that they entitle themselves to that Parsonage by a grant of H. 8. who had it by 31 H. 8. of Dissolutions (e).

(e) Goodwin
against the
Dean and
Chapter of
Wells.

Noy's Rep.
Tithes set out.
Notice.

(f) Spencer's
Case.

Noy's Rep.
Composition.

(g) Brey ag.
Partridge.
Noy's Rep.

(58.) It was said by Hutton in *Spencers Case*, that by the Civil Law the parishioners ought to give notice to the Parson when the Tithes are set forth. But it was adjudged, that the Common Law doth not so oblige a man (f).

(59.) B. by his Deed Compounds for Tithes, and after sues for them in the Ecclesiastical Court, by Popham and Gaurdy, that an Action upon the Case lies. *Vid. E. 4. 13 Mich. 4. Jac.* the Lady Waterhouse was sued for the Tithes of Trees, whereof none were due, &c. there an Action upon the Case does not lie, for the Parson or person may well be ignorant of what things are due, otherwise he sues against his own knowledge (g).

(60.) To

(60.) To have a Prohibition the Surmize was, that the Inhabitants of *Dor* which he is an Inhabitant, have paid *an mod decimandi*, &c. And they were at Issue; and he proved only, that he himself had paid it, and yet well: And no Consultation; for every particular is included in the general, and proved by it. And it appears sufficient matter for a Prohibition, and to oust a Spiritual Court of their Cognizance. (2) Agreed, that where the Statute appoints proof of the Surmize to be by two, it is sufficient if two affirm that they have known it to be so, or that the Common Fame is so (b).

(61.) Upon a Surmize by a Parishioner, that he had Compound- ed with the Parson for his Tithes for one year, and it may be without Deed; by *Brownlowe*, that a Prohibition shall be awarded, and that there are divers Presidents in this Court. But otherwise, if it be for more years, it is not good without Deed. (2) And in *Skinner's* Case, it was Ruled by the Court upon a Surmize to have a Prohibition, that if it be proved before one of the Judges within the Six months, although that it be not Recorded till after the Six months, yet it is well enough; and good also, although that the proof be in the Vacation: *Pasch. 43. Eliz. B. R. Poynter against Johnson* (k).

(62.) A Parson prefers his Bill for Tithes of *Haste, Holly, Willow, Whitehorn, &c.* a Prohibition was moved, because they were of 20 years growth and more: And by the Common Custom in *Hampshire*, they were used for Timber to build and repair their Ploughs, and cased *Pasch. 14. Jac. B. R. 1918. Cuffie's* Case against the Parson for *Holly, Willow, and Maple*; and a Prohibition was awarded. And *Hubbard* said, that in *Cumberland* Beech was used for Timber, and the use of the Country for scarcity of other Trees will alter the Case (l).

The Parson Libels for Tithes of *Hay, &c.* The Parson said, that the Custom of the Parish hath been, that he that hath Corn within the Parish ought to reap the Corn; and also the Tithes of the Parson, and to make them in Coeks, and to preserve them until the Parson shall carry them away: and a Prohibition was granted; for although that the parishioners ought *de jure* to reap the Corn, as it was agreed *Trin. 28. Eliz. B. R.* yet he is not bound to guard the Tithes of the Parson, &c. But if the Parson does not carry them away in convenient time, an Action on the Case lies against him. *Pasch. 20. Jac. B. R. 1286.* there such an Action was brought by *Wiseiman* against the Rector of *London in Essex*, for not accepting, &c. of the Tithes of *Chester* (m).

(63.) B.

(b) Mich. 15.

Jac. C. B. rot.

725. Ford. ag.

Woodham

Noy's Rep.

Composition.

(i) Mich. 16.

Jac. C. B. Rot.

541 Green ag.

Dickenson.

Proof of Sur-

mize for a Pra-

hibition.

(k) Skinner's

Case.

Noy's Rep.

Tithe-Haste,

Holly, Willow,

White-horn.

(l) Pinder ag.

Spencer.

Noy's Rep.

Whether Par-

shioner shall

preserve the

Parsons Tithes?

(m) Dr. Bridge-

man's Case.

Noy's Rep.

Testis singularis
to prove pay-
ment of Tithes.

(n) *Bray* vers.
Partridge.
Noy's Rep.

Composition.

(o) *Brooks*
Case in Noy's
Rep.

Tithes set out.

(p) *Webb* a-
gainst *Pettit*.
Noy's Rep.

Tithe of *Pidge-*
ons.

(q) *Worlington*
vers. *Perrey*.
Noy's Rep.

(63.) B. brought an Action upon the Case, that P. sued for Tithes, and recovered, because there was *nisi Testis singularis* to prove the payment, when in truth he had paid it before two, but now own was dead; and by the Court Resolved, that an Action doth not lie, because the Cause was merely Spiritual: And for that it differs from 8 E. 4. 13. for there the Composition was a Temporal Contract, although it was for Tithes (n).

(64.) G. moves for a Prohibition, and surmizes that the Parishioners had Compounded with the Parson for the Tithes; but yet the due Tithes were severed and exposed, and the Parson takes and carries them away; the Parishioner meets him and takes them from him. And upon that the Parson sues in the Ecclesiastical Court: And a Prohibition was awarded (o).

(65.) W. Sues P. in the Ecclesiastical Court for not setting out the Tithes of two Acres; P. prays a Prohibition, because he had set out the Tithes of one Acre *in specie*, and that a party unknown had taken them; and for the other he suggests a *Modus Decimandi* for 2 l. 6 d. And upon that Issue is joyned; and the Witnesses said that for a long time, as they heard say, the Occupiers of that Farm, whereof that Acre, &c. had used to pay annually to the Parson 3 shillings for all Tithes; and agreed by the Court, (1) As to the first, *Quod Prohibitio stet*, for after the Tithes are severed, if a Stranger takes them away, the Parson hath his Remedy against him at Common Law, and shall not sue the Parishioner in the Spiritual Court. (2) It was agreed, that a proof (*by hear-say*) was good enough to maintain the surmise within the Statute of 2 Ed. 6. But as to the other Acre, *Popham* held, that the *Modus Decimandi* is not well proved; but *Fenner* and *Yelverton* the contrary: For by that appears, the Parson is not to have Tithes *in specie*, and for that had not any cause to sue for them in the Spiritual Court (p).

(66.) W. sues P. in the Ecclesiastical Court for Tithes of a Dove-house. P. upon Suggestion had a Prohibition; but he did not prove his Suggestion within the Six months. W. takes issue upon the Suggestion, and it is found against him; and yet he prays Costs by the Statute of 2 Ed. 6. for failure of proof within the Six months. But by the Court adjudged, that he shall not have it; for he hath surceased his time, to take advantage of that, and he can never have a Consultation. *Ergo*, He shall not have double Costs. Read the words of the Statute (q).

(67.) A Parson prefers his Bill for Tithes of Corn, and alledges, that time out of mind, &c. in that Parish they have used to allot the Tenth-Shock; whereupon the Parishioner Suggests, that the Parishioners and all those who have Estates, &c. have used only to set

set out the Tenth-sheaf of Tithes, and had a Prohibition. The Parson prays a Consultation; but it was denied. And Resolved by the Court. That the Parson might Sue for a *Modus Decimandi* in the Ecclesiastical Court, 2 R. 3. 3. a. But if the Parishioner denies that, they ought to surcease, and a Prohibition lies, and that shall be tried at Common Law (u). Modus Deci-
mandi.

(68.) A. Libels in the Ecclesiastical Court for the Tithes of *Pilchards* taken in the Sea. And now the party had a Prohibition; upon a Surmize that the Custom there is, That the Fisher-Boat, hath one Moity of the Fish, and the Fishermen the other Moity: And that the Owner hath used to pay the Tenth of his Moity in discharge of all, &c. And it was held by the Court to be a good Surmize; for by the Common Law he cannot have the Tithes of Fish taken in the Sea, because it is not within any Parish; and then when the Parson, by the Custom, ought to have the Tithes of them, he ought to take them according to the Custom. And that the Tenth of the Moity may be a good discharge of the whole. And the parties went to issue upon the Custom in *Cornwal* (w). (u) Steward's
Case in Noy's
Rep.
Tithes of Sea
Fish.
(w) Holland
vers. Heale.
Noy's Rep.

(69.) By the Court (*Popbam* being absent) it is clear, That an Agreement betwixt the Parson and one of the Parishioners, that he shall have his own Tithes for years, it is good enough without Deed, but otherwise, if it had been for life. And it is a better way to plead that as an agreement, and not as a Lease (x). (x) Small's
Case.
Noy's Rep.

(70.) A Prohibition for a Suit in the Ecclesiastical Court, for Tithes of Rent in *London*. It was held by the Court, That by 33 H. 8. cap. 12 the Suit ought to be before the Major of *London* by complaint in Writing, and not by word of mouth only, in nature of a *Monstrans de droit*, declaring all the title. And if the Suit be in the Ecclesiastical Court for Tithes in *London*, that Court may grant a Prohibition; and yet that Court hath not power to meddle with them. (2) It was Resolved, That a Reservation by a Lessee for life, who Leases for years to A. is not sufficient to bind him in Reversion, to pay Tithes according to that rate. (3) That a Rent for half a year, and afterwards for another half year, is a yearly Rent within the meaning of the Decree: And note, as the same was last Let, is not intended last before the Decree, but before the Demand of the Tithes (y). (y) Dr. Meads
house vers.
Dr. Taylor.
Noy's Rep.
Collector of
Tithes.
(z) Bricken-
dine vers.
Denwood.
Noy Rep.

(71.) It was found upon a Special Verdict, That the Parson of the Parish makes A. Collector of Tithes, and that A. had Licensed a Parishioner to carry away his Corn without setting forth of Tithes. By the Court clearly, that License is void, *vid.* 5 E 3. 63. *Plow.* 104. That a Collector of Rents cannot make an Acquittance and discharge them. And a Consultation was awarded. (2) Noy Rep.

Fraudulent setting out of Tithes.

(a) Hill, 7 Jac. B. R. Ford vers. Pemroy. Noy's Rep.

Tithes, whether the Parsons or the Vicars?
(b) Randall vers. Knowls. Noy's Rep.

(c) Philips ag. Slacke, ibid.

Tithe-Park.

Mod. Decimand.

Ad Sharp. 2g. Shap. Noy's Rep.

(72.) Baron and Feme Lessee of a Parsonage, &c. The Parson sells forth the Tithes fraudulently, and presently takes them away again, as it appears upon the Evidence. And the Husband only brought the Action upon 2 Ed. 6. for the treble Damages. And it was Resolved, That Debt lies for treble Damages upon such a fraudulent setting forth of Tithes, although that the clause of Treble Damages speaks nothing of Fraud. But (2.) it was Resolved, That the Husband and Wife ought to have joyned in the Action; because it is not a thing in possession. And if the Husband dies, the Wife shall have the Damages, and not the Executor of the Husband (a). (73.) A Prohibition was prayed upon a Surmize, That the Tithes for which the Suit was, belonged to the Vicar, and not to the Parson: By the Court, That a Consultation shall be granted; for the Right of Tithes is confessed. And whether they belong to the Parson or the Vicar, that is merely Spiritual. And that so it was Ruled in one *Bushel's Case*, the Parson of *Pancras*; and in one *Milbray's Case* it was Adjudged accordingly (b).

(74.) By the Court, That a Prohibition shall not be granted upon a bare Surmize, that he is sued for Tithes by the Parson of D. of Lands in the Parish of S. unless it appears in the pleading in the Spiritual Court: For they there shall no be Judges of the bounds of the Parish. *Vid. 5 H. 5. 10. 22 E. 4. 24. (c).*

(75.) A Prohibition was prayed upon a Suit in the Ecclesiastical Court for Tithes in kind of a Park now converted into Tillage, upon a Surmize *de Modo Decimandi*, to pay a Buck and a Doe for all Tithes. And allowed, by the Court and agreed, (1) Although they are *Fera natura*, yet they may be given for Tithes: So to pay *Pheasants, &c.* (2) Although they are not Tithable of themselves yet they may be given for *Modus Decimandi*: As a great Tree may be given for Tithes of Trees Tithable. (3) That this is a discharge of the very Soil, and a Park is not but a Liberty, and the Owner may furnish it with Game when he please. But after a Consultation was granted, because the Surmize was not proved within the Six months: So Adjudged *Hill. 6. Jac. C.B.* The Vicar of *Glare* in *Sussex*, who sued for Hops. And there also a Prohibition was granted upon such a Surmize. But after a Consultation was granted in that Case: For the *Modus Decimandi* was alledged for Discharge of Tithes of Hay and Herbage, and not of all Tithes, where the Libel was for Tithes of Hops. And *Coke* Chief Justice vouched one *Shipden's Case*, That such a *Modus Decimandi* generally for the Park is not good, if it be disparked. But it shall be particularly for all Acres contained in the Park (d).

(76.) Upon

(76.) Upon a Summe to have Prohibition after Sentence at the Ecclesiastical Court, Two Judgments were vouched upon the Statute 2 E. 6. for not setting forth of Tithes. And 47 Eliz. B. R. a Parishoner privately sets forth his Tithes, and takes witnesses of it, and immediately after he carries them away; that is not a setting forth within the Statute. For the words are *truly, justly, and without fraud or covin*. Vid. 10 H. 4. 22. 44. Eliz. B. R. Baker's Case: A Parishoner sells his Grain upon his Land, and after by command of the Vendee he takes his Corn, being severed, without setting forth of the Tithes. That the Parson may well have an Action against him upon the Statute, and shall not be compelled to Sue the Vendee, who it may be was not known to him. And it is not Traversable, if the Tithes were set forth according to 47 Eliz. It was Resolved in Trin. 7. Jac. B. R. in *Brickendine's Case* against *Dennwood* (e).

(77.) If a Vicar hath used by Prescription time out of mind, &c. to have all the Tithes within the Parish (except Corn, which the Parson appropriate used to have) viz. of Hay, and also of Hops from the time it came into England, which was in the time of H. 8. and of Wood (which is a Dying plant) and moreover Rape-seed is sown there in the Parish, where never any such Seed was sown before, nor in England till of late times, yet the Vicar shall have the Tithes of that Rape-seed, and not the Parson appropriate; for that it is within the Prescription, although it be a new thing, and therefore could not be prescribed singly; and for that the Parson is excluded of all except the Corn (f).

(78.) If Doubt arise *de Decimis Garbarum*, as what shall be intended by *Garba*; it is said that *Garba* at the Common Law signifies at this day a Sheaf of Corn, and the *Civilian* say, *Garba* signifies such a thing as is bound together in one bundle (g).

(79.) In the Case between *Reynolds* and *Green* it was Adjudged by the Court, That Wood in its own nature is *Great Tithes*; notwithstanding if a Vicar be endowed *de Minutis Decimis*, and by virtue of the said Endowment had of a long time used to have Tithes of Wood not exceeding the yearly value of 6 s. 8 d. the usage of Wood shall pass by the words *de Minutis Decimis* in that case, by reason of the small value thereof (h).

(80.) Where a Parson had Two parts of the Tithes, and the Vicar of the same place had the third, and they by several Leases *Reynolds* and had demised the Tithes to one: In this Case the whole Court (except Justice *Fenner*) held, That although the Parson and Vicar could not joyn in this Case in a Suit of Tithes, because they claim them severally by divided rights, yet when both their Tithes are conjoined in one person, viz. the Lessee, then the interest of their

(c) Rochester
2g. Porter.
Noy's Rep.

(f) Pasch. 7.
Car. B. R.
Roll. Abr. ver.
Vicar.
Decima Garbarum.

(g) Roll. Abr.
verb. Vicar,
nu. 7.
Tithe-Wood.

(h) Mich. 10.
Jac. B. R. inter
Reynolds and
Green.

title is conjoyned also in one, (who made but one Action for the whole Tithes in that case) yet it was agreed by all the Judges, that the Plaintiff-Lessee should recover his Tithes in dammages, and shall not demand them again in any Suit, after a Recovery in this Action (i).

(i) Pasch. 3.
Jac. Sir R.
Champion
vers. Hill.
Brownl. Rep.
pa. 1. Actions of
Debt.
Brownl. Rep.
ibid.

(81.) It was Agreed by the whole Court of Kings Bench, *Mich. 5. Fac.* and hath many times been Ruled, That if a man sell his Tithes for years by word, it is good; but if the Parson agree, that one shall have his Tither for seven years by Word, it is not good, by the opinion of *Flemming* Chief Justice, because it amounts to a Lease: and he held strongly, That Tithes cannot be Leased for years without a Deed.

Action for stop-
ping the Par-
son's Way of car-
rying his Tithes.

(82.) Upon the Statute of 2 Ed. 6. cap. 13. for Setting out of Tithes, in a Prohibition to stay proceedings by a Parson in a Suit in the Ecclesiastical Court against one of his Parish, for hindering of him in his way in the Carriage of his Tithes. *The whole Court agreed in this*, That if the Parson have a usual Way stopped, that so he cannot come to take away his Tithes being set out for him, he may well sue for this in the Ecclesiastical Court, and there have his remedy. But if the Question be whether the Parson be of right to have a way (*viz.*) one way or another, this is Triable by the Common Law, and not in the Ecclesiastical Court, but if the Parson have a certain way granted to him, and set out by the Common Law, if he be at any time disturbed or hindred by any of his Parishioners, or by any other in the use of this his Way, he may then in such case well sue in the Ecclesiastical Court for his remedy. And the words of the Statute of 2 Ed. 6. cap. 13. are, That if any Parson be disturbed, stopped, or hindered in the carrying away of his Tithes, so that the Tithes comes to be lost, hurt, or impaired; in this case he may sue in the Ecclesiastical Court for his Remedy, and upon due proof there made thereof, he shall recover double value of the Tithe so taken or lost, besides his cost and charges of Suit. But because in this principal Case, the Parson sued in the Ecclesiastical Court for the Right of his Way, whether he was to have that Way or not, which belonged properly to the Common Law, and not Triable there in the Ecclesiastical Court; for this cause the Court granted a Prohibition to stay their proceedings in the Ecclesiastical Court.

Mich. 8. Jac.
B. R. Bulstr.
par. 1. Mich. 8.

A

A *Bby-Lands* were five ways privileged or discharged of Tithes, viz. by Composition, Bull or Canon, Order, Prescription, and Unity of possession of Parsonage and Land, time out of mind, together without payment of Tithes. (a) It is supposed, that no Land which belonged to Abbots, Priors, &c. is at this day (a) Hob. 308 discharged of Tithes, but such as came to the Crown by the Statute 309. of 31 H.8. c.13. All Monasteries under Two hundred pounds *per An.* were to be dissolved by the Statute of 27 H.8. But those of 200l. *per An.* or upwards, not till the 31 of H.8. The Unity aforesaid, or perpetual Unity is, where the Abbot, Prior, &c. time out of mind have been seized of the Lands out of which the Tithes arise, and also of the Rectory of the Parish in which the Lands lie. Which Unity (as to a discharge of Tithes) must have these four properties, (1) It must be *Justa* as to the Title: (2) *Perpetua*, or time out of mind: (3) *Aqualis*, that is, a Fee-simple both of the Lands and Rectory: (4) *Libera*, or Free from the payment of all manner of Tithes whatsoever. (b) In a Case where an Abbot held a Parsonage Improprate, which was discharged of Tithes, and had purchased Lands, so that the Tithes were suspended in the hands of the Abbot; and afterwards the Possessions of the Abbot coming to the King by the Statute of 31 H.8. The Question was, Whether the Lands so purchased by the Abbot before the Surrender to the King, were discharged of the Tithes? It was the Opinion of Mr. Plowden in that Case, that they were not discharged; for that no Lands were discharged, but such as were lawfully discharged by right Composition, or other lawful thing; and in the said Case the Lands were not discharged in Right, but suspended only during the time that they were in the Abbots hands (c).

Acorns or Malt of Oak shall pay Tithe, for they are of Annual increase, as in *Lisford's Case*. (d) These *Acorns* or Malt are known in the Law by the word [*Pannagium*]; so *Lindwood*, *Pannagium est pastur. Porcorum in Nemoribus & Sylvis, ut puta de glandibus, & alius fructibus arborum Sylvestrium, quarum fructus aliter non solent colligi*. *Lindw. de Decim. c. Sancta Ecclesia, verb. Pannagium*. And Mr. Skene *de verb. Sign.* defines this to be a Duty given to the King for the pasturage of Swine in his Forests: Also *Pannagium* is taken for the money which is paid for the Pannage it self, as appears by the Stat. of *Charta de Foresta, cap. 90. Unusquisque liber homo, &c.* (e). Bullstr. p. 1.

After-

(b) Idem 300.
Cro. 454. &
482.

(c) Mich. 17.
Elix. B. R.
Hughes Abr.
verb. *Disines*.
(d) Co. lib. 11.
& Regist. 49.
& Reynold's C.
Moore's Rep.

(e) Hill. 7 Jac.
E. of Shrewsb.
burie's Case.

- Aftermoath* or Second Moath: Of this Tithes shall be paid *de jure*, unless there be a Special Prescription of Discharge by paying the Tithes out of the first Moath, and then it shall be discharged
- (f) But if a man pay Tithe-Hay, no Tithes ought to be paid *de jure* afterwards for the pasture of the same Land for the same year, for he shall not pay Tithes twice in one year for the same thing, for that the After-pasture is but the Reliques of Hay, whereof he had paid Tithes before. (g) Nor shall Tithes be paid for Agistments in such After-grass. (b) In *Johnson* and *Awberie's* Case it was Resolved, that Tithes are not to be paid for the After-pasture of Land, nor for Rakings of Corn. (i) And where in *Awberie's* Case, Suit was in the Ecclesiastical Court for the Tithe of the After-mowings of Grass, and upon a Surmize, That the Occupiers of the Land had used to make the first Cutting of the Grass into Cocks for Hay, and to pay the Tenth Cock thereof in satisfaction of the First and After-mowings, a Prohibition was awarded. (k) So that After-grass, or After-pasture, or After-moath do not pay Tithes, where they have paid before of the Grass of the same ground the same year, save whereby Covin to defraud the Parson, more Grass is left standing than was wont to be, or is there usual; Nor is the Herbage of Cattel, which eat up that Grass, Tithable, unless there be some Fraud in the case. (l) Notwithstanding the Premises, although the After-moath be not Tithable, where the Owner at his own costs, charges and labour, made the first Grass into Hay; yet *Q.* whether it may not be otherwise, where the Owner doth no more than cut down the Grass of the first Moath? (m).
- Agistment*, that is, a taking into Grass the Cattel of Strangers within the Parish where the Grass grows; this is Tithable, and regularly by the Owners of Tenants of the Land, not of the Cattel, unless the Custom makes it Tithable by the Stranger. (n) Heretofore there was not any Tithe paid for this Agistment; (o) but now the Law is taken to be otherwise: (p) And is (as aforesaid) to be paid by the Owner, not of the Cattel, but of the Land. (q) Under this Notion of *Agistment* is also comprehended the depasturage of Barren Cattel, whereof comes no profit to the Parson, the Quota of which Tithes is regulated by the Annual vaule of the Land, the Number of the Cattel, or the Time of the Pasturing, according to the usage and custom of the place; yea, though the Cattel be bred for the Plough or Pail, to be employed out of the Parish where they are Agisted, and by one that is no Inhabitant within the Parish, Tithes shall be paid for the Agistment of such Cattel. But for profitable Cattel, as *Oxen*, *Horses*, or Beasts of the Plough, employed and used in the same Parish, no Tithes shall be paid for the Agistment thereof: (r) But if Cattel or Horses be bought
- (f) Pasch. 41.
El. B. R. per
Cur.
- Hill. 10 Jac.
B. Parson of
Stanfield in
Suffolk per Cur.
Prohibit.
granted.
- (g) Pasch. 16.
Jac. B. *Nicholls*
& Hooper, per
Cur. 3 Jac. B.
R. *Spencer* &
Johnson.
- Pasch. 17 Jac.
B. *Kenniston*.
- (b) 2 H. 4 Rot
Parl. nu. 93.
- (i) Cro. par. 1.
(k) More.
Case 1212.
- (l) P. 7. Jac. C.
B. adjudge.
Mich. 6. Jac.
C. B. *Smith's*
Case.
- Bullstr. 2. 238.
Cro. 2. 42. 116.
Green's Case.
- (m) Cro. 2. 42.
Hall vers.
Phettiplace.
- (n) 17 Jac. B.
R. & Cro. Car.
237. 559.
Jones 254.
- (o) E. N. B. 53.
(p) Adjudge.
Mich. 38. El.
C. B. *Grisman*
vers. *Lewis*.
- Cro. pa. 3. 446.
(q) Mich. 8.
Jac. C. B. inter
Baxter and
Hoper.
- (r) Roll. 1.
646. a. 6, 7.

bought not for any Husbandry in the same Parish, but to be sold again, Tithes shall be paid for the Agistment thereof, and a fraudulent employment of them in the Parish to defeat the Parson of his Tithes, will not prevent the same. (r) *A.* sued a Prohibition against (r) *B.* Parson of *D.* because he Libelled in the Ecclesiastical Court for a. 13. (r) *Rol.* 647.

Tithes for Agistments; the Plaintiff pleaded, That he had always paid 12*d.* for every Milch-Cow going in such a Pasture; and for this payment he had been discharged of Tithes for all Agistments in that Land. In this case it was said, That this payment of money for Milch-Beasts, should not discharge him from the payment of Tithes for other Beasts. (s) In the Case of *Lacie* against *Long* the suggestion for a Prohibition was, That the Parson sued in the Spiritual Court the Owner of the Land for Tithes of Cattel, which he took to Agistment, where he ought to sue the Owner of the Cattel: it seemed reasonable to the Court, that the Suit was well brought against the Owner; but be it *quomodocunque*, it belongs to the Spiritual Court to determine, whether the one or the other ought to be Sued; therefore for that reason, as to that point, a Consultation was granted *per Curiam*. (t) *Vid. Pasture.* (s) *Hill.* 43 *El.* C. B. *Sharington* and *Fleetwood's* Case. *Goldsb.* 157.

Agreement: No Parson can by any Agreement made with his Parishioner bind his Successors: but being made with him for his Tithes during only the Parsons life, this is good. (u) And an Agreement only by Word, without any Deed, may be good, made by the Parson with his Parishioner, that he shall keep his Tithes. (w) A Parson contracted with *A.* his Executors and Assigns, for 10*s.* to be annually paid him by the said *A.* his Executors and Assigns, That he, his Executors and Assigns, should be quit from the payment of Tithes for such Lands during the life of the Parson: *A.* paid the Parson 10*s.* which he accepted of, and made *B.* an Infant his Executor, and died: The Mother of the Infant took Letters of Administration *durante minori etate* of the Infant, and made a Lease at will of the Lands: The Parson Libelled in the Spiritual Court, for the Tithes of the same Land against the Tenant at Will. In this Case it was said, That the Agreement did oblige the Parson during his life: and although the Assignee could not sue the Parson upon the Contract, yet he should have Prohibition to stay the Suit in the Ecclesiastical Court, & put the Parson to his Remedy for the 10*s.* upon the Contract, for that he could not have Tithes in kind by reason of the Composition made. (x) If a Parson agree and contract with one of his Parishioners, that he shall keep back his own Tithes, if that be made after that he hath sown his Corn, and for the same year only, in that case the Agreement shall be good: And if the Parson sue in the Ecclesiastical Court for the said Tithes, the Parishioner shall have a Prohibition; but if it be fore more years than one, or before the

(t) *Hill.* 7 *Car.*

B. R. Lacie

vers. Long.

Jones Rep.

(u) *Co.* 11. 19.

2. 43.

(w) *Yelverts*

94. 55.

(x) *Pafch.* 29

Jac. B. R. Snell

and *Bennet's*

Case.

Godbolt. 333.

the Corn is sowed, this shall not be good, by *Coke* and *Foster* against *Warberton*; and *Coke* said it was so adjudged in *B. R.* in *Parson Booth's Case*, That a Contract made with a Parishioner for keeping back of his *Tithes* for so many years as he shall be Parson, was not good: and so it was in *Wellow's Case* here also: But it was Agreed by them all, That such a Contract or Agreement for the *Tithes* of any other was void; but only of the party himself, who was party to the Agreement, and that ought to be made by way of keeping them back. *Vis. 20 H. 6. & 21 H. 7. 21 H. 7. 21 b. (y).* *Tithes* can-

(y) Mich. 8.
Jac. 1610. C.
B. Brownl.
Rep. par. 2.

(z) Cro. par. 1

not be granted without Deed: It was Agreed by the Justices in *Dugg* and *Woodwards Case*, That an Agreement between a Parishioner and the Parson, that in consideration of twenty shillings per An. he should hold the Land discharged of *Tithes* during the life of the Parson, was not good to ground a Prohibition upon; for that the grant of *Tithes* cannot be without Deed. (z) The like in *Hawks* and *Brayfield's Case*, in stay of Suit for *Tithes* in the Ecclesiastical Court, it was Surmized, That *A.* was seized of a Messuage and Lands in the Parish of *D.* and agreed with the Defendant being Parson, in Consideration of ten pounds to be yearly paid by *A.* to the Defendant during their Joynt-lives and his continuing Parson, in satisfaction of all *Tithes* growing upon the same Lands, that he should hold the Lands without payment of *Tithes*: Resolved, it was not a sufficient Surmize to ground a Prohibition: For an Agreement to be discharged from payment of *Tithes*, for one year by word, may be good; but for such an Agreement during the life of the Parson cannot be good without Deed (a).

(a) Cro. pa. 2.
(b) Co. Inst.
par. 2. 652. b.

Alms, or Things appointed for *Alms*, are not Tithable (b).
Animalia Utilia, such as *Cows*, *Sheep*, and the like, shall pay *Tithes* in kind.

Animalia Inutilia, as *Oxen*, *Horses*, and the like, though *Tithes* cannot be paid thereof in *specie*, yet for their depasturage, or what bargain is made for the same, *Tithes* shall be paid (c).

(c) 2 Car. B.R.
Poph. Rep. 197.
(d) Parker.
vers. Kempe.
Bolstr. par. 2.
Co. Inst. pa. 2. &

Apples: Suit in the Ecclesiastical Court for the *Tithes* thereof, in discharge whereof an Award or Arbitrement was there pleaded, and the Plea refused; notwithstanding which a Prohibition was denied (d).

643. & Co. 11. par. 49. 2. Dr. & Stu. 173.

B.

Bark of Timber-trees is not Tithable, but is privileged together with the Trees.

Barren ground, which is *suapte natura* Barren, is not Tithable; but if Tithe-Wool and Tithe-Lamb have by 30 years been paid for it, and after by Manurance is made Fertile, then for the first Seven years such Tithe shall be paid for it, as was paid before. Therefore Barren Heath or Wast-grounds naturally Barren, and not Manurable without extraordinary charge, may pay Tithe of Wool, Lamb, or the like; but being converted into Tillage, shall pay no Tithe of Corn or Hay for the first Seven years after such improvement; during which time it shall pay only such Tithe as was formerly paid: otherwise it is, if it became barren only by ill Husbandry (e): Or if it became barren by some accident of Inundation, or overgrown with Bushes, and after reduced again to Fertility; in that case it shall pay Tithes presently (f). Also Marsh-Lands newly gained from the Sea, and Fenn-Lands gained from the Fresh-waters by Draining, &c. are not within the Statute of 2 Ed. 6. c. 13. to be freed from the payment of Tithes during the first Seven years after the gaining thereof. Likewise, if Land be gained from the Sea, and that by great cost and expence, and afterward turned to Arable-Land; it was the Opinion of the Court, that it shall pay Tithe notwithstanding the costs, because it is not Barren Land of it self, but only by accident, and so not within the scope and intention of the Statute of 2 Ed. 6. (g). In the Case between *Sturwood* and *Hopkins* upon a Prohibition, two Points were argued by the Four Justices, viz. (1) When a Prohibition is brought upon the Statute of 2 Ed. 6. to stay a Suit in the Ecclesiastical Court for Tithes of Barren-Lands the first Seven years, it behoves the party who brings the Prohibition, to prove his Suggestion within Six months; otherwise a Consultation by the said Statute is grantable. (2) When a Consultation is granted for the Reason aforesaid, yet the party may have a new Prohibition upon the same Libel; for that the Statute of 50 Ed. 3. doth not extend to a Consultation granted upon Non-probate of a Suggestion within Six months, but where a Consultation is granted upon the matter of a Suggestion: And so the Chief Justice declared the Opinion of the Four Justices, and thereupon a Rule given, That the Prohibition should stand, and the Defendant notwithstanding such Plea aforesaid in Bar of the Prohibition may plead in chief to the matter of the said Suggestion, and if he will

P p p

dispute

(e) More, Case 1278.

(f) M. 11 Jac.

C. B. Sharing-

ton's Case.

2 El. Dyer.

170. & 2 Ed. 6.

c. 13. Co. 2 Inst.

658.

Plow. 204. a.

371. b. vid.

15 Car. B. R.

in *Sugden* and*Cottel's* Case.

(g) Pasch. 14

Jac. B. R. *Witt*and *Buck's*

Case.

Bullstr. 165,

169. par. 3.

(b) Hil. 6 Car.
B.R. *Strowd*
vers. *Horkins*.
Jones Rep.

Sherington and
Fleetwood's
Case.
Cro. par. 1.

Bull. par. 3.

dispute it, then he shall have several Consultations on the said Li-
bel (b). Thus (as aforesaid) in a Prohibition for Tithes it was
said by *Popham* Chief Justice, That all Lands be overflown with
Water, and afterwards gained by Industry, Tithes shall be present-
ly paid, although it had been overflown time out of mind; for
those Lands of their nature were not barren, and the Statute of
2 Ed. 6. doth not intend, that Tithes shall not be paid within seven
years, but of such Lands as were meetly barren, and made good
by Foldage or other industrious means. And so it was Adjudged
Pasch. 14 Jac. B.R. in the Case between *Witt* and *Buck*, in a Prohi-
bition upon the Statute of 2 Ed. 6. cap. 13. the Clause touching
Barren and Heath-ground, of which after improvement, no Tithes
to be paid the space of Seven years next after the Improvement.
For a Prohibition it was shewed, That this Land, for which the
Parson Libelled for Tithes, was Marsh and Sandy Land, and cover-
ed with Salt-water, so that time out of mind no Grass had been
known there to grow, nor any profit at all made of this, until now
of late time, by and with the great costs, charges, and industry of
the Tenant, this ground had been lately gained from the Sea, and
from its overflowing, by repairing and making new Banks and Sea-
walls, and by continual repairing of them, and so he had now con-
verted the same into Arable Land, where he had Corn, and of this
Land the Parson Libels for Tithes in the Ecclesiastical Court. And
upon this matter thus shewed, a Prohibition prayed, being to be
discharged from payment of Tithes of this Ground for Seven years,
this Statute being thus made for the encouragement of Tenants to
make improvement of their Land. *Coke* Chief Justice, It was Re-
solved in one *Farrington's* Case upon this Statute of 2 Ed. 6. that
Wood-ground is not Barren-ground within this Statute. This was
there Adjudged, That if one do stock and grub up Wood-ground,
and after convert this into Arable-ground, he hath by this meliora-
ted this Land, but with great cost and labour, yet he shall pay Tithes
for this ground presently; for that Heath and barren-ground in-
tended to be within the Statute, ought to be such Land as is *super*
natura sterilis, and Barren. *Doderidge* Justice, A Salt Marsh, if this be
fenced and so made good Meadow, shall pay Tithes presently; yet
before this was so fenced, no Tithes thereof payable. *Coke*, This
Land shall be out of the Statute, out of the clause of Discharge for
Seven years, notwithstanding this charge the Tenant hath been at
in gaining this Land from the Sea, for to have this Land within the
clause of Discharge within the Statute, it ought to be *super natura*
Barren, which here it is not, but by accident, and by the over-
flowing of the Sea. The whole Court agreed in this, That by this
Statute Barren-ground is such ground as will not bear Corn of it,
self

self, without very great cost in the extraordinary manuring of it, and therefore, that this is no such *Barren* ground within the Statute, as ought to be discharged from payment of Tithes, but that Tithes ought to be paid for the same, and that the Parson had just cause to sue for his Tithes in the Ecclesiastical Courts; and therefore the Prohibition was denied.

Beech Trees regularly are Tithable; yet in a County where there is a scarcity of Timber, and where *Beech* is used as Timber for Building, or the like, there possibly they may be discharged of paying Tithes; and therefore in *Trin*, 38 *Eliz*. it was Resolved, That Tithes shall be paid of *Beeches*, although they are above twenty years growth, for they are not Timber. Yet in *Holiday* and *Lee's* Case in a Prohibition it was Resolved, That Tithes should not be paid of *Beeches* of above twenty years growth; (i).

And in *Pindar's* Case it was also Resolved, That *Beeches* above twenty years growth, being Timber, shall not pay Tithes; yet in a County where there is plenty thereof, they are not to be accounted Timber, or Tithes-free. So that *Beeches* in their own nature are not computed Timber-trees, and therefore Tithable, except where by the Custom of the Country, where there is scarcity of Wood, they are accounted Timber-trees, in which case they are not Tithable: (i).

The Judges of the Common Law have Resolved, That all sort of Wood that is usually employed for the building of Houses, Mills, &c. are Gross Woods, and within the Statute of 45 *Ed. 3. cap. 3.* of which sort are *Oak, Ash, Elm, Betsh, Horse-Beech, &c. Horn-beam*, against the opinion in *Malyn's* Case; (m) as also in *Man & Somerton's* Case, where it was said by *Tanfield* Justice, That *Beech* by the Common Law is not Timber; and so he said it was Adjudged in *Cary* and *Pagett's* Case; and in that case it was holden, That Tithes shall not be paid for *Beech* above the growth of twenty years in a common Country for Wood, as in *Buckinghamshire*, for there it is reputed Timber; but in a plentiful Country of Wood it is otherwise, for there it is not Timber, and Tithes shall be paid of it, as *Sylva Cadua*, for which Tithes shall be paid under the growth of 20 years (n).

Bees pay no Tithes by the 10th Statute, but by the 10th Statute of Hony, & the Tenth weight of Wax; and are Prebend Tithes.

Birch-Trees are Tithable, though above 20 years growth; (o) & therefore in *Foster* and *Leonard's* Case in Attachment upon a Prohibition for Suing for Tithes of Great Wood, against the Statute of 43 *Ed. 3.* it was Resolved. 1. That of *Birch* Tithes shall be paid, for that they are not such Wood as the Statute intended; as serving for Building. 2. That *Oak* and *Elm* cut down before the age of 20 years shall pay Tithes; for till they are of that age they are not of

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(i) More. Rep.
Holliday, &
Lee's Case.
(k) More. Caf.
716, 717. Jac.
C.B. Pindar's
Case.

(l) Adjudg.
Pakch. 16 Jac.
Q.B. in Pindar
and Spensers
Case.
(m) Sir S.
Degg's Law of
Tithes, c. 4.

(n) Pakch.
Jad. C. B. Man
and Somerton's
Case. Brown.

(o) More. Caf.
1271, 1272.

Apert with the Parson shall not have any Tithes thereof, for he is nothing but Pasture for such Horses: If a man buy or breed Cattel, feed them and sell them, he shall pay Tithes thereof, otherwise if he buy or breed them, feed them and send them in his own house. Nor shall a man that feeds Sheep on his Land, and after kills and eats them in his own house within the Parish, pay any Tithes thereof. If a man buy or breed barren Cattel, as Oxen and Steers, & after sell them, he shall pay Tithes for their Pasture, for they cannot yield any other Tithes: otherwise it is of Barren Sheep, as of *Weathers*, for they can yield Tithe of their Wool. If a man keep Horses, which are Barren Cattel, to sell, and he sell them accordingly, he shall pay Tithes thereof. But it was resolved in *Facy* and *Long's* Case, That Tithes shall not be paid of any Cattel eaten in the Parishioners Family, no more than for Cattel reared for the Plough and Pail.

Cattel therefore or Beasts for the Plough or Pail are not Tithable, otherwise in case they be only kept for such use, till they be ready for the Plough or Pail, and then sold away, in such case they shall pay Tithe, being so sold for profit. And if they stray from one to another side of a Common belonging to two Parishes, no Tithe is payable for this to the Parson of the Parish where the Cattel do stray. And as Dry Cattel, though bred for the Plough, are Tithable, if they be sold away before they are put to that use: so also are Fat red Cattel, if they be sold or killed for the House, but according to the Custom of the place. (a) Likewise for young Cattel, as *Calves*, *Lambs*, *Celts*, *Pigs*, &c. where their Dams are removed from one place to another, a Rate Tithe is payable to the Parsons according to the time of their abode in the several places, from the times of their engendring, by the Month-Rate. (b) Also Cattel Tithable feeding in any waste place, not commonly known to be in any Parish, are Tithable to the Parson of the place where the Owner of the Cattel doth dwell. But if Cattel do feed one half of the year in one Parish, and the other half year in another Parish, the Tithe shall be equally divided between the two Parsons of both Parishes: proportionably for a greater or less time, provided it be the space of a Month or 30 days; but of any less time than a Month, no Tithe is payable. (c) If Cattel be pawned or pledged, the Gagee shall pay the Tithe of them, because he is owner of them for the time; but if a man Bail Cattel or other goods to Re-bail, Tithes of them shall not be paid by the Bailee, because he hath no property in them, but only a Rebailor. (d) *Chalk* and *Chalk-pits* are not Tithable. *Cheese* paying Tithe, except at the payment of Tithe-Milk, where of the Cheese is made: *Et de contrâ*. So that Cheese is not Tithable where the Milk is Tithed, *Et vice versa*. Therefore to prescribe to

pay

M. 3 Jac. B. R.
per *Tynes*, said
That it was
one *Sampson's*
Case of *Ejfec*,
Adjudged. Tr.
18. B. B. R.
inter *Shering-*
ton & Fleet-
wood, per *Cu-*
riam. M. 7 Car.
B. R. *Facy &*
Long, per *Car-*
Tr. 15 Jac. B.
R. *Lamkin &*
Wils.

Mich. 8 Car.
B. R. *Baxter &*
Hopes Case.
Brownl. 2. par.
acc. Trin. 20. Car.
Jac. Wench. 28.
33. acc. 2. Car.
(1) M. 17 Jac.
B. R. Mich. 2.
Jac. B. R.
Webb's Case.
Mich. 8. Car.
by 3 Justices.
Bulltr. 2. 238.
& March. 56.
(b) Bro.

Disines 16.
Lane 16.
Goldsb. 147.
Plow. 66.
(a) Term 2. acc.
B. R. Bro.
Disines 47.
(d) Pasch. 1.
Car. Adjudg.
acc. *Hugh* Ab.

(c) More,
Case 1279.

(f) Pasch.
17 Jac. B. R.

(g) Hill, 18.
Jac. B. R. inter
Doderidge
and Johnson.

(h) Ibid.

(i) 20 Eliz. B.
R. by Wray,
and all the
other Judges.

(k) Co. 4. 44. a.
2 Inst. 655.
Dr. & Stud.
1. 2. c. 55. &
Hob. 176.

pay the Tenth Cheese between May and August for all the Tith e Milk within the year, and nor the Tenth part of the Milk, may be a good Prescription. (c) And where Milk is Tithed in kind, there no Tithes Cheese is due. In which case, as in all others of Tithing, the Custom of the place is to be observed.

Cherry Trees in Buckinghamshire have been Adjudged Timber, & Tithie free (f).

Chicken of all Tame Fowl are Tithed in kind, according to the Custom of the place. No Tithie shall be paid of Chicken, for that there is paid Tithie Eggs; and Prohibition granted. Hill. 15 Jac. B. R. Resolved.

Clay is not Tithable (g).

Clothes Fullled in a Fulling-Mill pay no Tithes (h).

Coles are not Tithable; therefore a Prescription *de non Decimando* (as to that) is good. (i) No Tithes shall be paid *de jure* for Cole. Hill. 14 Jac. B. R. per Houghton.

Common of Estovers, or the Wood which a man burns in his house, doth not pay Tithes.

Composition Real is one of the ways or means whereby Tithes may be discharged: It is where the Incumbent, Patron, and Ordinary, by Deed or Fine, do agree that such Lands shall for ever be freed and discharged of all manner of Tithes paying an Annual payment, or doing some other thing for the profit or advantage of that Parson or Vicar to whom the Tithes did belong, (k) from which Compositions of Prescriptions *de Modo Decimandi* have or should have had their Original. But these Real Compositions, so as to oblige the Successor of the Parson or Vicar that made the same, seem now to be restrained by the Statute of 13 Eliz. cap. 10. whereby they are prohibited from making any Grant for above 21 years or three Lives, and that with the accustomed yearly Rent reserved. And if the Parson or Vicar make any Composition with his Parishioner without his Patron and Ordinary, it shall bind only for the Parsons life, and during his Incumbency. This Composition is either between Parson and Parishioner, or *inter Clericos*; if it be between Parson and Parishioner, and it be touching Tithes past, the Composition is good, though it were without any Consideration at all: but if it be touching Tithes to come, it may be good as to a payment of Tithes only in part, but not good as to a non-payment of any Tithes at all; nor is it good in part without the Bishops approbation and confirmation. If the Composition be *inter Clericos*, and the Tithes be Personal Tithes, it holdeth not: but if they be Predial Tithes, the Composition holdeth, the Approbation of the Bishop of the Diocess being thereunto had. So that the Composition one for the remitting or entirely taking away of Tith is not good in

in Law; but a Composition with the Parson or Vicar to have but the thirteenth Sheaf for his Tithes, was held to be a good Composition, and should bind the Parson. (f) Composition may likewise prevent the payment of Tithes in kind; and if it be made with a Parson or Vicar to pay a *Modus Decimandi*, which hath continued time out of mind, Custom being equivalent to Law, it is good, and shall bind the Parson and his Successors (m); and although a *Modus Decimandi* cannot begin at this day, but must be by Prescription, yet a Composition may be made, which shall bind during the life of him that made it (n). The Case was, A Vicar did contract with his Parishioner to pay so much for increase of Tithes, and died: his Successor sued in the Ecclesiastical Court for them. A Prohibition in this case was granted by the Court. The words of the Contract were (*inter se convenerunt*): It was holden, that this was not a real Composition, although that the Bishop did call it *Realis Compositio*, for his calling of it so, doth not alter the nature of it; but it remains a personal Contract, and so shall not bind his Successor, although it were confirmed by the Bishop. It was said by *Mallet Justice* in this case, A Real Contract, although it be made between Spiritual persons, and of Spiritual things, is only questionable at the Common Law (v). Composition shall bind during the life of him that made it, though not his Successors (p).

Coneys taken in a Warren shall pay Tithes; yet they are not predial, but personal Tithes. *Sed Q.* Whether Tithes shall be paid of them; because *Berkley Justice*, They are not Tithable but by Custom, 15 *Car. B.R.* For no Tithe *de jure* without a Custom ought to be paid for them, for they are *Fera natura*, *Trin. 8 Car. B.R. Worden* and *Bonner's Case*; after a Prohibition granted, a Consultation denied *per Curiam* for the reason aforesaid. *Pasch. 13 Car. B.R. Sir Ja. Broun* and *Dr. Bradish's Case per Cur.* a Prohibition granted, and *Hil. 13 Car. B.R. Vincem* and *Turt's Case*, a Prohibition granted, and for Prohibition pleaded by the Parson to have them by Prescription. *Mich. 14 Car. B.R. Williams* and *Wilcox's Case*. Or if a man steals *Coneys* out of a Warren, he shall pay no Tithes of them, because the Law gives them no property in them; nor shall the right Owner pay any Tithes of them, because he hath no profit by them.

Corn pays a predial Tithe, as that which comes, partly by the Industry of Man, and partly of the Earth, *Mich. 8 Jac. C. B. Magna Charta* 649. And if a Custom be alledged, That the Parson shall have but the Tenth Sheaf of Wheat for all the Tithes of all manner of Corn and Grain, this is no good Custom (r). Yet Corn of all kinds sowed is Tithable according to the Custom of C.B. the place; and is commonly Tithed by the Tenth Shock, Cock, or Sheaf, where the Custom of the place is not otherwise; but

(l) *Hugh's Parsons Law*, cap. 27.

(m) 8 H. 6. 22, 23. 9 H. 6. 17.

6 E. 3. 27.

17 E. 3. 11.

12 H. 4. 13.

19 H. 6. 75.

34 H. 6. 36.

31 H. 6. 28.

35 H. 6. 5.

26 H. 8. 7.

27 H. 8. 20.

&c. 21. acc.

(n) *Pasch. 17*

Car. in Hitch-

cock's Case.

(o) *Pasch. 17*

Car. B. R.

Hitchcock &

Hitchcock's

Case.

Marth 87.

(p) *Mich. 6*

Jac. C. B. Case

Mildmay &

Hutton.

Pasch. 15 Car.

Adj. jud. acc.

Ibid.

(r) 38 *Eliz.*

(1) *Smith's*
Case, C.B.
 (1) 1st Ed. 4.
Dr. & Stu.

not to put the Parsons Tenth up on end in Shocks, unless the Custom of the place be so (1). And if the Owner will not cut his Corn before it be spoiled, the Parson is without remedy (1). And if he doth change the Corn or Grain sowed in the same ground, such change of the Corn so sowed doth change the Tithe to the same kind of that Grain. And if a man pay Tithe of Corn, he shall not pay any Tithe for the Stubble, which grew the same year on that Land. *Hill, 6 Jac. B. pl. 13. Smith's Case per Cur. & Case ibid. Pasch. 7 Jac. per Cur. & Mich. 9 Jac. Baxter & Hope, for the Alter-grafs, & 2 H. 4. Rot. par. nu. 93.* No Tithes for the Agistment in such After-pasture. And if the Parson hath Tithes of Corn one year, and the Land be left without Seed the next year, that so it may be plowed and made ready for Seed the third year, no Tithes shall be paid the second; for by lying fresh the Land is the better, and the Parson will have the better Tithes the third year. *Pasch. 7 Jac. Smith's Case.* By the Statute of 2 Ed. 6. cap. 13, the Parson or Vicar is privileged to come upon the Land to see the Tithes set forth: For by the said Statute it is Enacted, That at the Tithing-time of Predial Tithes, it shall be lawful for any to whom Tithes are payable, or for his Deputy or Servant to see the said Tithes to be set forth and severed from the Nine parts, and quietly to take and carry them away. And as the Parsons Rights are hereby secured from the danger of having his predial Tithes subtracted: so likewise the Law hath provided, not only for the prevention of his being defrauded therein, and for his quiet removal and carrying the same away; but also for an open, free, and unobstructed way and passage through which to carry the same away, as appears by *Halsey's Case*. The Case was this: *H.* procured a Prohibition against *H.* and declared, that the Defendant had sued him in the Ecclesiastical Court for a Way or Passage; he was proprietor of Tithes in the Parish of *M.* and that the Common way to carry the Tithes out of the Plaintiffs Land was by a Close called *S.* and that the Plaintiff had stopt it up, when in very truth the Way was by Prescription by a Close called *W.* and that he had pleaded it in the Ecclesiastical Court, and the said Court would not allow thereof, and for that the Cognizance of a Prescription for a Way ought to be tried at the Common Law, and not in the said Court, &c. Whereupon the Defendant demurred, and by the Opinion of the whole Court a Consultation was granted; for that the cognizance of Ways for the carrying of Tithes belong to the Court-Christians, as appears by the Statute of 2 Ed. 6. and *Fitz. N.B.* in Consultation, and *Lindwood de Decim.* (u) When Tithes of Corn are severed from the Nine parts, an Action of Trespass lieth against any that shall take them away, whether he be

(u) *Hil. 6 Car.*
B.R. Halsey
vers. Walsley.
Jones Rep.

be the Owner of the Land or a Stranger. (u) Also an Action of Debt lieth for Predial Tithes, as of Corn, Wood, Grass, Fruits, Hay, &c. and treble Damages recoverable upon the said Statute of 2 Ed. 6. 13. But not so for lesser Tithes, as of Wool, Lamb, &c. nor Money given to the Parson in lieu thereof; but for each of these Suit may be commenced according to the Statutes of 27 H. 8. and 2 Ed. 6. 13. & 32 H. 8. 7. (x). So that if the Owner of the Corn set out his Tithes, and after take it away, the Parson may sue him in the Ecclesiastical Court, or bring an Action of Trespass against him; But the Parson may not sue a Stranger in the Ecclesiastical Court for taking away the Tithes which were set out. In *Hele's Case* against *Frestenden*, the Resolution of the Court upon Two Cases upon the Statute of 2 E. 6. for not setting forth of Tithes was this, *viz.* A man possessed of Corn sells it, and before Two Witnesses set out his Tithes, and afterwards privily takes away the Tithes; and the Parson sues him upon the Statute for Treble Damages for not setting forth of Tithes: And the Defendant proves by Witnesses that he set forth his Tithes; yet the Fraud is provided against by the Statute, for the words are [*without Fraud or deceit*]. In the second Case, One secretly sells his Corn to one who was not known, and afterwards the Vendee commands the Vendor to cut the Corn, which he doth, and takes away the whole Corn without setting forth his Tithes; the Question was, who should be sued for the Tithes: and the Court held, that the first Vendor should be sued, for it was fraudulent. And where a Woman, being Proprietor of a Parsonage took A. to Husband; a Parson within the Parish set forth his Tithes and divided them, and then immediately took them back again; A. the Husband alone sued for the Treble value according to the Statute of 2 E. 6. Two points were moved, (1) Whether that were a setting forth within the Statute? And by the Court, that it was not; and so hath been Adjudged in 43 & 44 Eliz. and 1 Jac. (2) Whether the Husband may sue for the Treble value without naming his Wife? And to that the Court would be Advised; for though the Husband may sue alone, where a thing is personal for which he sueth, as the Books of 4 Ed. 4. 31. 7 Ed. 4. 6. 15 Ed. 4. 5. & 11. are; yet where the Statute saith, that the Proprietor shall have suit for the not setting forth, &c. the Husband is not intended Proprietor as the Statute intends, but the Wife, and for that the Wife ought to joyn For the due manner of Tithing Corn, the Parson ought of Common right to cut the same, and to prepare it for the Parson; and to separate it from the Nine parts; he ought also of Common right to make up the Corn into Sheaves, but is not obliged to gather and set it up into Hillocks or heaps, for the manner of Tithing

(u) Bro. Dismes 6. & Errowal. 2. p. 10.

(x) Co. on Litt. 159.

Hill. 6 Jac. Brownl. Rep. pa. 1. Cases in Law, &c.

Ford ver. Penroy. Brownl. pa. 2.

Hill. 6 Jac. B. pl. 13. per Cur.

Trin. 21. Jac.
B. R. Guin &
Merrywea-
ther's Case.
Roll. Rep.

Stebs and
Goodrick's
Case.
Mores Rep.

is good, if the Corn be thrown out in Shocks; and being so set out they become Lay-Chattels. In *Guin and Merryweather's Case* it was said by *Doderidge* Justice, that if one defame and scandalize the Parsons Title to the Tithes, although he be not punishable for this in the Temporal Courts, yet he is punishable in the Ecclesiastical Court; he said also, that when Tithes are set out, they are then Lay-Chattels, and if a Stranger carry them away, the Action lies not in the Ecclesiastical, but Temporal Court; otherwise it is if it were not severed from the Nine parts. *Loy* Chief Justice Agreed it, and said, that if a Stranger take the Corn before Severance of the Tithes, the Parson shall sue in the Ecclesiastical Court for Tithes against the Trespasser, and not against the Titheman; And where the right of Tithes comes in question, Prohibition shall not be granted, Nor shall Fraud or Covin prevent the payment of Tithes; for in a Case of Tithe-Corn, where the Custom of *L.* in the County of *B.* was alledged, that the Parson ought to have the Tenth Land of Corn, beginning at such Land which was next to the Church; the Occupiers of the Land, to defraud the Parson by Covin, did not sow the Tenth-Land, nor manure it; yet the Parson sued for Tithe in kind, to have the Tenth Cock for Tithe of the Corn sowed, and a Prohibition awarded notwithstanding the Covin, because he had Remedy at the Common Law for the Fraud.

Cows that yield Milk, no Tithe is to be paid for the pasture thereof; and if a man hath but one Cow, and no Cheese made of the Milk thereof, the Custom of the place must be observed, so that something be paid for the Tithe thereof, otherwise no Custom will bind.

Curtelages, or places adjoyning to Mansion-houses, and applied to Seeds, Herbs, &c. are Tithable in kind, if the Parson make not an Agreement for the same; otherwise it must be Tithed in kind, by setting forth the Tenth-part for the Parson when the owner receives his Nine parts.

Custom is, where a Right to many is procured in Common and Publick: as Prescription is privately to one. If the Custom be of translating of Tithes Predial (as in Composition) then it holdeth: Otherwise, if it be of Tithes personal. But if it be of not yielding Tithes at all, it doth not hold; for Custom of paying nothing at all, is not good; but if it be only of yielding less than the Tenth, it holdeth both in personal and predial Tithes. It holdeth also as to the place where Tithes ought to be left, of the Time when to be yielded, as also of the manner and form of yielding them. So that although Custom (which chiefly refers to a Place, as Prescription doth) to a person cannot totally take the Tithes

Tithes away, yet it may limit and moderate the payment thereof. Notwithstanding in some places and cases, a Custom applied to a Country to pay no Tithe (as in 40 Parishes for the *Wild* in *Sussex*) is good; but generally such a Custom is not good. Likewise, a Custom tending to the impoverishment of the Parson or Vicar is no good Custom. *Mich. 11 Jac. C.B. inter Jux and Sir Charles Candish*. Likewise a Custom to pay Tithes truly, without view of the Parson; is not good. (y) Also a Custom alledged to pay (y) the Tenth Sheaf of Wheat for the Tithe of all manner of Corn and Grain, is not a good Custom. *dist. Cas. Jux & 38 Elix.C.B. Adjdg.* But a Custom to pay Tithe-wool at *Lammas-day*, though due at Shearing, is good. (z) But such is the strength of a Custom, that it cannot be discharged by a verbal agreement for money. (a) Custom may make that Tithable, which of it self is not Tithable; (b) and may alter Tithes in any other thing, which will be a *Modus Decimandi*, sufficient to bind the Parson and his Successors. (c) Custom is properly Triable at the Common Law upon a Prohibition; but a Consultation may be granted on a Prohibition granted on a Surmize not proved within Six months; as was Adjudged, *Hill. 6 Jac. C.B. in Cas. inter Sharp and Sharp. Noj. Rep. Custom and Prescription*; both ought to be without interruption, constant, & beyond the Memory of man, perpetual, that is, no man in being remembers to the contrary; for it seems, if any man, or any Authentick Record, or other sufficient Evidence can prove it was otherwise at any time since the first of *R. 1. viz. 1189.* the Custom or prescription at Common Law would not hold. (f) Albeit by the Statute of 2 E. 6. c. 13. Tithes are to be yielded and paid as of right they had been within 40 years next before; which time somewhat agrees with the Ecclesiastical Computation: And by the Statute of 27 H. 8. c. 20. they are to be paid according to the Ecclesiastical Laws and Ordinances, after the landable Usages and Customs of the Parish; which was also after confirmed (as to the lawful Usage and Custom) by the Statute of 32 H. 8. 7.

(z) More. Cafe.

1230.

(a) Hob. 106.

(b) March. 165.

(c) Co. Select

Cafes 14, 46,

48.

(f) Co. 2. Inst.

653.

Q q q 2

D.

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Decimæ Majores, such as Corn, Hay, &c. belong to the Parson: *Decimæ Minores* or *Minusæ*, as Saffron, Herbs, &c. do belong to the Vicar. *Paseb. 38 Eliz. B. R. Beding & Feak's Case & Mich. 1 Car. C. B. Sir Rich. Udall and the Vicar of Alton's Case.*

Deer, though they are *Feræ naturæ*, yet they may be given for Tithes; and although they are not Tithable of themselves, yet they may be given for a *Modus Decimandi*. *Hill. 6 Jac. C. B. the Vicar of Clare's Case. Sharp and Sharp's Case. Noy 148. acc.*

Deprivation: A Parson may after his Deprivation sue in the Ecclesiastical Court for subtraction of Tithes, which were due to him before his Deprivation, and a Prohibition will not lie in the Case Adjudged, *Hill. 13 Jac. Cole's Case.*

Discharge of Tithes may be either by Custom, Prescription, Composition, Statute, Unity of Possession, or by Privilege, as to Religious Orders now not of use. (g) There may be also a Discharge of Tithes as against the Vicar, by the payment thereof unto the Parson. (h) And it may be by Real Composition, (i) but it cannot be by a Verbal Agreement for Money. (k) And if there be a Discharge not of the Tithes themselves, but from the Exact payment thereof by a *Modus Decimandi*, or Annual recompence in satisfaction thereof, it must be by Custom or Prescription. (l) By the Common Law a Lay-man, although he were capable of a Discharge of Tithes by Grant of the Parson, Patron, and Ordinary, or by Composition; yet at that Law none had a capacity to take or receive them, save only Ecclesiastical persons, or a Mixt person, as the King. (m) And by the same Law, if a Bishop were absolutely Discharged of Tithes by Prescription, whilst the Lands were in his hands, his Demising thereof to a Lay-man could not make the same chargeable therewith. (n) For in *Wright's Case*, where the Bishop of *W.* was seized of a Mannor in right of his Bishoprick, Prescribed that he and all his Predecessors had held the same Mannor, and the Demes thereof time out of mind for him, his Farmers, Tenants for years or at will, discharged acquitted from payment of Tithes for these Lands; the Bishop made a Lease for years of parcel of the Demesns: The Farmer of the Rectory Libelled in the Ecclesiastical Court against the Lessee for Tithes; all which matter he plead in the Ecclesiastical Court, and the Judge there refused to allow of the allegation in discharge of the Tithes: It was held in this Case, (1) That if the Lands of the Bishop were

(g) Co. 1. pa. 33. & 2 Ed. 6. 13. & 32 H. 7.

Co. 44. & Brownl. 2. pa. 33.

(h) Yelvert. 86.

(i) Lane. 17.

Hob. 269,

296, 309.

(k) Hob. 176.

(l) Co. 13. 16.

(m) Co. 2. B.

of *Winchester's Case.*

(n) Co. ibid.

were absolutely Discharged in his hands by Prescription, the Demising of it to a Lay-man could not make it chargeable with Tithes. (2) That a Spiritual person may Prescribe in *non Decimando*. (3) That the refusal by the Ecclesiastical Judge to allow the Allegation in Discharge of Tithes, is not Traversable. (o) In like manner the King being seized of Lands, parcel of the Forest of *B.* in Fee in right of the Crown, Discharged of the payment of Tithes, granted the Lands to the Earl of *Hariford* in Fee; and it was held, that the Patentee should be Discharged of payment of Tithes; and a Prohibition was granted in that Case. (p) Yet in another Case, where it was surmized for a Prohibition, that the Prior of *B.* was seized of Lands, parcel of his Priory, and held them till the dissolution, Discharged of Tithes, for his Farmers and Tenants for life or years; that the Priory was dissolved 27 *H. 8.* that the King was seized of the Lands, and shews the Statutes of 32 *H. 8.* & 2 *Ed. 6.* and that the King died seized of the Lands, that by mean Conveyances it was conveyed to *J. S.* and that the Plaintiff being his Tenant for years, was sued by the Parson of *B.* for the Tithes of these Lands. It was Resolved by the Court, that the Lands which came to the Crown by the Statute of 27 *H. 8.* should not be Discharged from the payment of Tithes, but should pay the same, although the Lands in the hands of the said Religious Persons or Houses were Discharged from the payment thereof, for that the Privileges were Personal Privileges, which were extinguished by the said Statute of Dissolutions, and there are not any words in the said Statute of 27 *H. 8.* to save the Privileges; and the Statute of 31 *H. 8.* being a subsequent Law, had not respect to these Privileges. (q) Likewise where a Parson by Deed Indented leased his Glebe *cum omnibus proficuis & Commoditatibus*: It was notwithstanding Adjudged, that the Lessee should be charged with the payment of Tithes. And in *Branches* Case it was Resolved, that an Union of Copyhold Lands, and of the Parsonage in the hands of the Parson, as Parson Imparsonée, was no Discharge of the Tithes of the Copyhold Lands. And in this Case it was also, Adjudged, that a Farmer of Lands might Prescribe in *modo Decimandi*, but not in *non Decimando*.

The Statute of 31 *H. 8.* gave all Colleges Dissolved, to the Crown, in which there is a Clause, that the King and his Patentees should hold Discharged of Tithes, as the Abbots held: Afterwards the Statute of 1 *Ed. 6.* gave all Colleges to the Crown; but there is in it no Clause of the Discharge of Tithes: The Parson Libelled in the Ecclesiastical Court; and the Farmer of the Lands of the College of *Maidstone* in *Kent* brought a Prohibition upon the Statute of 31 *H. 8.* The Court was clear of Opinion, that the King had

(o) *Wright* and
Wright's Case.
Cro. par. 1.

(p) *Mordant*
and *Gummin's*
Case.
Cro. par. 3.

(q) Mich. 11.
Car. B. R.
Sydown and
Holme's Case.
Cro. par. 3.
Parkins and
Hind's Case.
Cro. par. 1.
Mich. 28. E.
liz. in Car.
Warder,
More.

Green and
Buskyn's Case.
Mores Rep.

Quarls and
Sparring's C.
Mores Rep.

had the Lands of the Colledge by the Statute of 1 Ed. 6. and not by the Statute of 31 H. 8. But the Justices doubted, the Lands coming to the King by that Statute, whether they should be Discharged of Tithes by the Statute of 31 H. 8. there being no Clause in the Statute of 1 Ed. 6. for Discharge of Tithes: But it was Resolved by the Justices, that Unity without Composition or Prescription, was a sufficient Discharge of Tithes by the Statute of 31 H. 8.

The Templers were Dissolved, and their Possessions and Privileges by Act of Parliament 17 Ed. 2. transferred to St. John of Jerusalem; and their Possessions by Act of Parliament 32 H. 8. cap. 24. given to the King: It was Resolved, that the King and his Patentees should pay Tithes of those Lands, although the Land propriis sumptibus excolantur, because the Privileges to be Discharged of Tithes were proper to Spiritual persons, and ceased when the person Spiritual was removed: And the Statute of 31 H. 8. of Dissolutions did not extend to such Lands as came to the King by Special Act of Parliament, as those Lands of St. John of Jerusalem did. And Mich. 6 Jac. C. B. in a Case de Modo Decimandi it was said, that one may be Discharged of Tithes five ways: (1) By the Law of the Realm, viz. the Common Law, as Tithes shall not be paid of Coles, Quarries, Bricks, Tiles, &c. F.N.B. 53. and Reg. 54. nor of the After-pasture of a Meadow, &c. nor of Rakings, nor of Wood to make Pales, or Mounds, or Hedges, &c. (2) By the Statutes of the Realm, as 31 H. 8. 13. 45 Ed. 3. &c. (3) By privilege, as those of St. John of Jerusalem in England, the Cisterciens, Templers, &c. as appears 10 H. 7. 277. Dyer. (4) By Prescription; as by Modus Decimandi, annual recompence in satisfaction. (5) By real Composition. By all which it appears, that a man may be discharged of payment of Tithes; yet a Lay-man ought not to prescribe in non Decimando, albeit he may in Modo Decimandi. And this in effect agrees with Tho. Aquinas in his Secunda Secunda, Quæst. 86. art. ult. vid. Dr. & Stu. lib. 2. c. 55. fo. 164. And the Causes why the Judges of the Common Law permit not the Ecclesiastical Judges to try Modus Decimandi, being pleaded in their Courts, is because that if the Recompence which is to be given to the Parson in satisfaction of his Tithes, doth not amount to the value of his Tithes in kind, they might overthrow the same: And that appears by Lindwood, Constit. Meppham. de Decim. c. Quamvis propter, verb. Consuetudines. For this Reason it is said a Prohibition lies, and therewith agrees 8 Ed. 4. 14. vid. 7 Ed. 6. Dyer. 79. and 18 Eliz. Dyer. 349.

Mich. 6 Jac.
C. B. Case of
Modus decim.
Co. lib. 13.

In a Prohibition upon a Suit in the Ecclesiastical Court, by the Defendant the Vicar of D. for Tithes: A Prohibition prayed upon his

his Plea there of a *Modus Decimandi*, to pay so much yearly to the Parson of *Dale*, in Discharge of his Tithes, and the same Plea there disallowed. The whole Court agreed, that this *Modus* between him and the Parson, will not discharge him from payment of Tithes, as to the Vicar; and therefore by the rule of the Court a Consultation was granted. Also the Court was of Opinion, that where a Bishop holds Lands discharged of Tithes, and he makes a Feoffment of the Land, the Feoffee shall be discharged of Tithes, and the like. If the King hath ancient Forest Lands discharged of Tithes, and the King grants this Land, the Grantee is discharged of Tithes: And it is a General Rule, that he which may have Tithes, may be Discharged of Tithes. So long as the Land is occupied by him who hath the Fee-simple, which did formerly belong to the Order of *Cisterians*, it shall pay no Tithes; but if he let it for years or life, the Tenant shall pay Tithes. For anciently there were many large Estates wholly exempted from paying Tithes, as Land belonging to the said *Cisterian* Monks, to the *Knights Templars*, and *Hospitalers*: As in the Earl of *Clanrichard's* Case, who Libelled in the Ecclesiastical Court for the Tithes of Hay of a certain Meadow against *Dame Denton*, who pleaded, that the Prior of *A.* was seized of that Meadow as parcel of the Possessions of the Priory, and that they held it discharged time out of mind, &c. whereupon Issue was joyned upon a Prohibition, and it was found for the Plaintiff; for that the Land was only discharged when it was in the hands of the Priory, and not when it was in the hands of their Farmers, and they were of the Order of *Cisterians*, whereupon a Consultation was granted; and now a new Prohibition was prayed, for that in the Ecclesiastical Court they had added to the former Libel, when the Statute of 50 Ed. 2. cap. 4. is, *That whereas a Consultation is duly granted upon a Prohibition; that the same Judge may proceed in the same case by virtue of the former Consultation, notwithstanding any other Prohibition*: Provided always, that the matter in the Libel of the said cause be not altered, enlarged or otherwise charged. Dr. Bove, Doctor of the Civil Law said, that there was not any enlarging or charging in substance of the Libel in question; for whereas in the former Libel it was, *That they had used to pay Tithes time out of mind*, now in the second Libel is added, *That although the Prior was discharged yet they, viz. the Farmers, have paid Tithes for 20, 30 or 40 years, or time out of mind*. *Montague Ch. Justice* said, that it seem'd that that was not an alteration; but *Doderidge & Houghton Justices* held, that that was an alteration of the Libel; for now by that last Libel, *They could fetch them in for Tithes, though they were discharged in the hands of the Abbot*: and for that the Tithes had been paid for 20, 30 or 40 years since

Mich. 14 Jac.
B. C. Winrel
against Child.
Hulstr par. 3.

Mich. 9 Jac.
C. B. Brownl.
Rep. par. 1.
Cases in Law,
&c.

Brownl. ibid.

the

the Statute aforesaid (the which is a sufficient time to make a Prescription, according to the Law of the *Civilians*) they would charge the Land with Tithes in whose soever hands they are, when by the Statute it ought to be discharged only in the hands of some, viz. the Priors; and afterwards Dr. Pope pulled off the Addition, which he had made to the former Libel, off from the Second Libel. And the whole Court said, that if he proceeded upon that Addition, that Sentence shall be given for Tithes, upon any Prescription since the Statute, that then they would grant a Prohibition. *Mich. 18 Jac. B. R. Dame Denton's Case* and the Count of *Clanrickard. Roll. Rep. par. 2.*

Discharge of
Tithes.

The Order of the *Præmonstratenses* were discharged of all Tithes of their Land, the which *Manibus aut sumptibus excolebant propriis*. All the Chief Monks paid Tithe as well as other men, till Pope *Paschal* at the Council of *Mentz* Ordained, that they should not pay Tithes *de Laboribus suis*; and that continued as a general Discharge till the time of *H. 2.* when Pope *Adrian* restrained it to three Orders, viz. the *Cisterians*, the *Templars*, and the *Hospitallers*. And the Discharge which the Order of the *Præmonstratenses* had, was made by Pope *Innocent* the Third, by his Bull. And after in the Council of *Lateran*, *ad Ecclesiam nimium gravaretur*; it was provided, that the Privilege of the *Templars* should not extend to their Farmers. Vid. *Case Dickenson and Greenhal. Mich. 22 Jac. B. R. Roll. Rep. 2. part.*

In *Hurrey's Case* against *Boyer* in a Prohibition to the Ecclesiastical Court, for stay of a Suit there for Tithes of Lands which were the possessions of the Hospital of *St. John of Jerusalem*, upon Suggestion that the Prior of the said Dissolved House of *St. John* had this Privilege from *Rome*, which was by divers Councils and Canons; viz. That of the Lands of their Predecessors, which by their own hands and cost they did Till, they were not obliged to pay Tithes. In this Case it was agreed, that this Hospital was not Dissolved by the Statute of *31 H. 8. c. 18. of Dissolutions*, but by a Special Act made *32 H. 7. c. 24.* by which their Corporation and Order was Dissolved, and their Possessions given to the King, with all the Privileges and Immunities thereto belonging, which the King granted to the Plaintiff in the Prohibition; and whether he should hold them Discharged of the payment of Tithes was the question. *Harris* Serjeant urged, that this Immunity was annexed to the Corporation of the Prior, and his Brethren of the said Hospital, and doth not come to the King, it being determined by the Dissolution of the said Hospital; and so Adjudged in *B. R.* against the Book of *10 Eliz. Dyer 277. 6. 2. Case*, the Bishop of *Winchester's Case*, *14 B.* and the Archbishop of *Canterbury's Case*, *47 B.* and

and 18 *Eliz. Dyer* 349. 16. *Nichols* Serjeant to the contrary, & cited a Canon made by the Council of *Mag.* and another made by *Innocent* 3. *An.* 1215. and divers others, and also the Statute of 2 *H.4.4.* and 7 *H.4.6.* and if Land be Discharged of payment of Tithes by Prescription of not Tithing, and this Land come to the King, the Priviledge remains; and these Lands are given to the King in the same plight and case, as they were in the Hospitallers; and affirmed the Book of 10 *Eliz. Dyer* 277. 60. to be good Law; and that the aforementioned Cases of the Archbishop of *Canterbury* and the Bishop of *Winchester*, and the words of the Statute of 32 *H.8.24.* gives the King not only the Mannors, Houses, &c. but also all Liberties, Franchises, Priviledges, &c. In this Case it was Confessed, that it came by reason of the Order of the *Cisterians*, as appears by the Canon: And *Hutton* Serjeant arguing for the Defendant, said, that it appears by the Statute of 2 *H.4.4.* that it is Personal, and that it differs from the Land which came to the King by the Stat. of 31 *H.8.* For by that the King is Discharged of payment of Tithes, and so are his Patentees; but that this Priviledge is personal, and if so, then it is determined by dissolution of the other, and a personal Priviledge in case of Tithe is not transferred to the King. *Barker* Serjeant for the Plaintiff in this case said, That it was Ordained by *Edgar*, King of this Realm, that Tithes shall be given to the Mother-Church: Also *Edmund*, *Ethelstone*, *William the Conqueror*, and the Council of *Magnans*, specially provided that Tithes should be paid, but did not appoint when they should be paid. But the first Law which appointed the quantity was made in the time of *Ed. 1.* and this Ordained when they ought to pay the Tenth with the fear of God. And before the Council of *Lateran* every one might pay his Tithes to what Parson he would, and then were paid to Monasteries as Oblations. If a Parson in one Parish claim Tithes in another, as portion of Tithes due by Prescription to his Rectory, he ought to shew the place especially, *viz.* the place where the Tithes lie. In the Seventeenth year of *Ed. 2.* the Order of the Templers was dissolved, and their Possessions annexed to *St. John of Jerusalem*: and they did not claim by any Bull of the Pope, nor other Spiritual Canon, but by Prescription, which is Priviledge and private Common Law, as appears by the Stat. of *Westm. 2. cap. 74.* And *Mephams* Canon in the time of *Ed. 1.* saith, *Let the Custom be observed.* And another Canon, That Custom of not Tithing, or of the manner of Tithing, if they paid less than the Tenth part, shall be observed. *Vid. Panormitan. & Cas. Hurrey vers. Boyer. Brownl. Rep. & dist. Cas. Pasch. 9 Jac. Rot. 1511. C. B. Brownl. Rep. par. 2.*

Coke 2. The
Bishop of Win-
chester's Case.
38 Eliz. fo. 43.

In the Bishop of Winchester's Case, 38 Eliz. it was Resolved, That at the Common Law none had capacity to take Tithes but Spiritual persons, or *Persona mixta*, as the King, and regularly no meer Lay-man was capable of them (except in special Cases;) for he could not Sue for them in the Court Christian; and regularly a Lay-man had no remedy for them until the 32 H. 8. A Lay-man may be Discharged of Tithes at the Common Law by Grant, or by Composition, but not by Prescription; for in the Books of the Common Law it is commonly said, That a Lay-man may Prescribe *In modo Decimandi*, but not *In non Decimando*: And the reason, is, because he is not (except in Special Cases) capable of Tithes at the Common Law, before the Statute of 32 H. 8. cap. 7. And therefore without Special matter shewed, it shall not be intended that he hath any lawful Discharge, and in favour of the Holy Church (although it may have a lawful Commencement) the Law will not suffer this Prescription, *In non Decimando*, to put it to the Trial of Lay-men. A Spiritual person that was capable of Tithes at the Common Law in Pernancy, may Prescribe to be Discharged of Tithes generally, or to have a portion of Tithes in the Land of another. Before the Council of Lateran, every man might give his Tithes to any Spiritual person that he would; and if the Lands of the Bishop were Discharged in his hands absolutely by Prescription, the Demising it to a Lay-man cannot make it chargeable, and the Bishop might reserve the greater Rent.

Parkins and
Hind's Case.
Cro. par. 1.

A Parson by Deed Indented leaseth his Glebe, *cum omnibus proficuis & commoditatibus*: It was notwithstanding Adjudged, that the Lessee shall be charged with the payment of Tithes. And in an Action of Debt upon the Statute of 2 Ed. 6. for not setting forth of Tithes; the Case was, The Lands were a parcel of the possession of the Templers, whose Lands were annexed to the Priory of St. Johns. The Templers had a Special Privilege to be Discharged of Tithes of those Lands, which *propriis manibus excollunt*. By a Special Act of 32 H. 8. the Possessions of the Priory of St. Johns, were given to the King by general words of all Lands *in tam amplissimo modo, &c.* as the Abbots held them. Resolved, That the Defendant should not be Discharged, nor have the Privilege; for by the Common Law a Lay-person was not capable of such a Privilege, and the King should not have the Benefit of the Privilege, until the Statute of 31 H. 8. But the Statute extends only to such Possessions as came to the King by Surrender, and should be vested in him by that Act, and doth not extend to Possessions which are vested in him by another Act, and these Lands were given to the King by a Special Act of Parliament, and therefore not Discharged of Tithes.

Cornwallis &
Spurling's C.
Cro. par. 2.

Dotards, or the Branches of Trees of twenty years growth or upward, are not Tithable (u).

(u) More.

Doves in a Dove-house do pay Personal, not Predial Tithes, (o) but if stoln out of a Dove-house, no Tithe is to be paid of such. (p) Tithes shall be paid *de jure* of young Pigeons. *Mich.* 14. *Jac.* B. between *Whatley* and *Hambury* Resolved. *Hill.* 15 *Jac.* B. R. Resolved, and a Prohibition denied in *Gastrell's* Case. By Custom acc. Tithes may be paid of Pigeons spent in a mans own house, but not so of Common right. *Case. ibid.* But if sold, they shall pay Tithe. *dict. Cas. Whatley.*

(o) Case 1270.

(p) 15. Car.

Adjudg.

(q) Pasch. 15.

Car. Adjudg.

E.

Eggs are Tithed in kind, or according to the Custom of the place, which serves for the Tithes of the Tame and Domestic Fowl, where their young are not paid in kind; and where Tithe of Eggs is paid, there is no Tithe of the young: And so *vice versa*, where the Tithe of the young is paid, there no Tithes of Eggs may be demanded.

F.

Fallow-Grounds pay no Tithe for those years wherein they lie Fallow, nor is the Pasture thereof Tithable, unless it be kept Lay beyond the course of Husbandry; for if Land lie Fallow every two or three years, the same is a charge unto the Owner and Tenant for that time, and an advantage to the Parson in the bettering of his Crop the year following, when the same is sowed with Corn or Grain; and therefore, although the Grass and feeding of the Fallow-ground for that year be some small profit to the Owner of the Soil, yet he shall not pay Tithe for the same, as hath been Adjudged. (a) Yet it was afterward Adjudged, (b) That if Lands be Tithable, and the Tenant or Occupier of the Land will not Plough it, or Manure it, especially thereby to prejudice the Parson; that in such case the Parson may Sue the Tenant in the Ecclesiastical Court to have Tithes of that Land.

(a) Pasch.

7 Jac. C. B.

(b) 15 Car. by

Barkley Justice

in C. B.

Fera natura, Beasts and Birds that are such, are not Tithable, (c) till they become tame and profitable to the Owner, that is, till they are reduced to a Tameness and Property; yet it hath been held, that Tithes are not payable for tame Purkies, Pheasants, or Par-

(c) 12 H. 8. 4.

(d) More.
Case 322.

(e) Case Sharp
versus Sharp.
Noy. Rep.
(f) 12 H. 8. 4.
by all the Ju-
stices.

(g) Bulstr. 8.
165.

(h) More.
Case 603.

(i) Tr. 8 Car.
B. R. Earl of
Desmond's
Case, adjug.
Cro. 1. pa. 192.
& 15 Car. B. R.
Adjudg.
Hugh. Abr.
verb. Difines.

(k) Cro. Car.
264. 1. 339.
Roll. 1. 635.
c. 4, 6, 7.

(l) Law of
Tithes, cap. 8.

(m) Hill. 9 Car.
B. R. Cro. par.
1. 247.

tridges, not for their Eggs. (d) Although Beasts *Ferae naturae*, as Bucks, Does, Pheasants, &c. are not Tithable of themselves; yet they may be given for Tithes, or for a *Modus Decimandus* as a great Tree may be given for Tithes of Trees Tithable. (e) And as things which are *Ferae naturae*, whereof a man hath not an absolute property, are not Tithable: so likewise of things which are merely for Pleasure Tithes shall not be paid (f).

Fenny-Lands drained and made Arable do pay Tithes, (g) notwithstanding the Statute of Barren Land (b).

Fish taken in the Sea, are by Custom of the Realm Tithable, not by the Tenth Fish, but some small Sum of Money in consideration of a Tithe. (i) But if taken in a Pond, or in a several Piscary, then they are Tithable by the Owner thereof as a Predial Tithe, and as such ought to be set forth according to the Statute of 2 Ed. 6. *Trin.* 8 *Jac. C.B.* the Earl of *Desmond's* Case, *Mich.* 15 *Car. B. R. Adjudg. acc. vid. Trin.* 9 *Car. B. R.* Yet it is said, that *Fishers*, *Fowlers*, and *Hunters*, not for pleasure, but by way of Trade for profit, pay some Tithe by usage in nature of a personal Tithe to the Parson or Vicar where they inhabit, though they take their Fish, Fowl, &c. in another Parish; but if they paid Money to another in that other Parish for this liberty of Fishing, &c. then he that takes that Money, must pay as a Predial Tithe to the Parson of that other Parish where he inhabits. *Fish* taken in the Sea, being *Ferae naturae*, are not understood to be Regularly, but Customarily only, Tithable, as in *Cornwall*, *Wales*, *Yarmouth*, &c. (k). And so it hath been Resolved; (l) albeit in the said Case of the E. of *Desmond* it was held, that they were Tithable by the Custom of the Realm: In which case it is more probable, that the *Fishers* pay a Personal, than the Fish a Predial Tithe, to the Parson or Vicar of that Parish where they inhabit. To this purpose there is a Case extant, wherein a Prohibition was granted against the same Parson of *W.* in the County of *L.* for suing in the Ecclesiastical Court for the Tithes of Trouts taken in a River, because being *Ferae naturae* they are not Tithable; and a President was shewed. 5 *Car.* where a Prohibition was granted against the same Parson for suing for Tithe-Eels taken in the River, because they were *Ferae naturae*. And it was said, that in *Yarmouth* was a Suit for Tithe-Herrings taken in the Sea; but they could not prevail in it. *Jones* Justice said, That in *Wales* they used to pay Tithes for Herring; and in *Ireland* it is a common course to pay Tithe for Salmon taken in Rivers: whereunto it was replied, That that might peradventure be by Custom, for otherwise Tithes are not due for Fish taken in Rivers. (m) For no Tithes *de jure* are to be paid for Fish taken in a Common River. *Pasch.* 5 *Car. B. R.* a Prohibition granted to stay a Suit for Tithes of

of Eels taken in a Common River in the Parish of *Barton* in *Westmerland*; and *Hill. 9. Car.* Prohibition granted to stay a Suit for Tithes of Trouts in the same River. But the Court seemed to be divided, whether Tithes of them were due or not: But they granted a Prohibition, for that the Law shall decide thereupon; it was between *Dawes* and *Huddlesone*. No Tithes shall be paid in kind without a Custom for Fish taken in the high Sea out of any Parish. *Hill. 14. Car. B. R.* between *Long* and *Direill per Curiam*, and Prohibition granted accordingly. And Justice *Jones* said, that on an Appeal to the Delegates out of *Ireland* in the Lord *Desmond's* Case it was Agreed, That for such Fish so taken, only Personal Tithes are due *deductis expensis*. Likewise, no Tithes in kind shall be paid *de jure* for Fish taken in a Common River, which is not enclosed, as in a Pond enclosed; for that they are *Fera natura*, although they are taken by one who hath a several Piscary there, and although the place where they are taken be within the Parish of that Parson who claims them; for it is a Personal Tithes, in which Tithes ought to be paid *deductis expensis*. *Pascb. 15. Urb. B. R.* between *Gold & Arthur*, & others, Prohibition was granted where the Suit was for Tithes of Salmon in the River of *Exe. Mich. 15. Car.* between *Whistak* & the said *Arthur*, and others: the like Prohibition granted on the same matter between other parties. And in the Case of a Prohibition is was Resolved, That Tithes shall be paid for Fish taken in the Sea; which is not within any Parish; and they shall be paid to the Parson of the Parish where the Fish is landed.

Appeal out of
Ireland to the
Delegates in
England.

Trin. 8 Car.
B. R. Cto. p. 2.

Flax pays a Predial Tithes, payable when dressed up, *Coke Mag. Char. 649.* The Tithes of *Flax* are *Minuta Decima. Mich. 14. Car. B. R.* in *Noah Webb's* Case.

Forest-Lands, that lie in no Parish, or between two Parishes, and anciently such, are not Tithable by the King or his Patentees; but if the Forest be in a Parish, and Land therein which is Tithes-Free, if the Forest happen to be disforested, it shall pay Tithes in kind. *Crompt. Jurisd. 52.* *Bacon* Chief Justice, at *Sarum-Assize*; the Case was, *A.* Lessee for years of the Earl of *H.* prayed a Prohibition against the Vicar of *L.* to stay a Suit in the Ecclesiastical Court for Tithes, because the Lands out of which the Tithes were demanded, were parcel of the Forest of *B.* whereof the King was seised in right of his Crown, and he and all his Predecessors held the said Lands discharged of Tithes, and shewed that the King had granted the said Forest to the Earl of *Hertford* in Fee, and so he ought to have them discharged of Tithes: In that Case it was held by the Court, That it was only a Privilege annexed to the Crown, during the time that the Land was in the Crown; but the Court doubted, whether the Patentee might have such Privilege:

(n) Mich. 3. ledge : But yet *de bene esse* the Prohibition was granted. (n) If
 Car. C. B. *Morant* and *Candling's* Case. Tithes do lie in any Forest, as in the Forest of *Windſor*, *Rocking-*
 Cro. p. 1. 67. *ham*, *Sherwood*, or other Forest which is not in any Parith, the King
 (o) 14 H. 4. 17. shall have them by his Prerogative, and not the Bishop of the Dio-
 ces, or Metropolitan of the Province, as some have thought. (o)

But yet it seems by 22 *Ass.* 25. if there be cause of Suit for such
 Tithes against the parties who ought to pay the same, such Suit might
 be brought in the Ecclesiastical Court: But if a Stranger take away
 such Tithes from the Parson or Vicar, there for such Trespass the
 Suit may be in the Temporal Court, as the same may befor taking
 away other goods in the like case. *Adjdg.* 15 *Car. B. R.*

Fowl taken by a Faulkner, who hawks for his pleasure, shall not
 pay Tithe; but if a Fowler kill *Fowl*, and make a profit of them, it
 hath been held, that he shall pay a personal Tithe for them. *Pajch.*
 15 *Car. Adjdg. acc.*

Fruits of Trees, as Apples, Pears, &c. are Tithable presently up-
 on their gathering, and are Predial Tithes; for the subtraction
 whereof the Parithioner is impleadable. *Stat. 2 Ed. 6. c. 13.* *Fruits*
 of Trees, Apples, Pears, &c. Maſt of Oak, Beech, &c. are Predial
 Tithes. *Coke Magn. Chart.* 649. The *Fruits* of Orchards and Gar-
 dens are Tithable in their proper kinds, and to be paid when they
 are gathered, unless there is some *Modus* or Rate-Tithe paid in lieu
 thereof.

Furſe is Tithable, and pays a Predial Tithe, unless the Owner
 thereof can prescribe or prove a Custom of Tithing Milk or Calves
 of the Cattel on the ground where the *Furſe* grows, *Mieb. 29. Eliz.*
B. R. vid. Heath.

G

G.

Gardens are Tithable as other Lands, and therefore the Herbs which grow therein pay Tithes in kind. Also Plants, Seed, Wood, Saffron, Hemp, Rape, &c. pay Tithes in kind, unless the Parson make an Agreement for the same; otherwise the tenth part must be set forth for the Parson, when the Owner receives his nine parts. *Mich. 8 Jac. C.B. in Baxter's Case. & Trin. 9 Jac. B. R.* The whole Court.

Glebe is a portion of Land, Meadow, or Pasture, belonging to or parcel of the Parsonage or Vicarage, over and above the Tithes. If it be Demised by the Parson to a Lay-man, it pays Tithe; otherwise, if he keep it in his own hands. (p) For *Glebe* kept in the (p) Owen 35. Vicars own hands, pays no Tithe to the Parson Improprate; it is otherwise if it be in the hands of the Lessee, (q) by whom it is (q) Brownl. 69. Tithable, if let by a parson Improprate. And although *Glebe* Lands are not properly Tithable, because *Ecclesia Ecclesie Decimas non debet solvere*; yet if *Glebe*-Lands be leased out by the Parson, the Lessee shall pay the small Tithes arising out of such *Glebe* Lands to the Vicar that hath small Tithes upon his endowment, as in *Blinco's Case*. (r) And yet in that case the Vicar Libelled in the (r) *Blinco* Ecclesiastical Court to have Tithes of the *Glebe* of the Parson, and ver¹ *Marston*. a Prohibition was granted, for that the *Glebe* shall pay no Tithe. Cro. par. 1. (s) Notwithstanding which, if a Parson lease his *Glebe* Lands, and 469. (s) *DiG. Case* do not withal Grant the Tithes thereof, the Tenant shall pay the *Blinco*. Tithes to the Parson. (t) Likewise, if a Parson sow his *Glebe* *Mares Rep.* Land, and then Lease the same, the Tenant shall pay the Tithes of (t) Cro. Eliz. this Corn to his Landlord the Parson. (u) Yet if a Parson sow 161- (u) Roll. 655. his *Glebe*, and die before Severance, some have held, that his Executors shall not pay Tithes of this Corn. And albeit where *Glebe* k. 1. Lands are leased out by the Parson, the Lessee shall as aforesaid, pay the Small Tithes thereof to the Vicar, that hath the Small Tithes upon his Endowment; yet he shall not have the Small Tithes arising upon such of the Parsons *Glebe*-Lands as the Parson keeps in his (w) Cro. Eliz. own hands. (w) Likewise on the other hand it hath been held, 578. That the Vicar upon a general Endowment, shall not pay Tithes of his *Glebe* to the Parson, or of the Fruits that arise from the same, and that for the same reason aforesaid, *Quia Decimas Ecclesia Ecclesie reddere non debet*. (x) But the Lessee of the Parsons *Glebe* (x) Compt. shall pay him in the Tithes thereof; to this purpose the Case was, Caf. Pasch. A Parson leased all his *Glebe* Lands, with all profits and Commo 7 Car. 1. B. R.

(v) Trin. 31
El. B. R. *Styde*
& *Miller*.
Leon. 300.
(2) *Hugh*.
Abr. verb.
Difmes.
Sec. 2. & 5.
Harris varf.
Cotten.
Brownl. pa. 1.
Actions of Debt.

Vid. *The Present State of*
England. pag.
228.

Mich. 5 Eliz.
Mores Rep.

dities, rendering 13 s. 4 d. *pro omnibus exactionibus & demandis*, & afterwards Libelled in the Ecclesiastical Court against his Lessee for the Tithes thereof: It was the Opinion of the Court, That Tithes are not things issuing out of Lands, nor any Rent or duty, but Spiritual; and if the Parson doth Release to his Parishioner all demands in his Lands, his Tithes are not thereby extinct, and therefore a Consultation was granted. (y) And so it was Adjudged 32 *Ed* in *Babington's Case*, That such Lessee should pay Tithes to the Parson, for that they are due *jura divina*, and cannot be included in Rent (z) As long as the Vicar occupies his Glebe Lands in his own hand, he shall pay no Tithes; but if he Demise it unto another, the Lessee shall pay Tithes to the Parson that is Improprate. If the Vicar sow the Land, and die, and his Executors take away the Corn, and doth not set forth his Tithe, and the Parson bring his Action of Debt upon the Statute of 2 *Ed*. 6. In this case the Court seemed to incline, that it would lie: The Glebe Lands and Spiritual Revenues of Clergy-men, being held in *pura & perpetua Eleemosyna*, *b.e.* in Frankalmoign, are excepted from Arraying and Mustering of Men or Horses for the War, as appears in a Stat. of 8 H. 4. *nu.* 12 in the unprinted Rolls of that Parliament. An Abbot was Parson Imparsoned of the Church where the Abbey and Tithes were, the Abbey was Dissolved; the King granted the Monastery to one, and the Parsonage and Rectory to another: It was the opinion of the Justices, That if the Land of the Abbey was the Glebe of the Parsonage before the Impropration, that then the Land was discharged of Tithes, for it remains Glebe notwithstanding the Appropriation, and the Glebe cannot be gained by Prescription, nor was ever chargeable to pay Tithes: And if the Parson doth make a Lease of his Glebe, the Lessee (as was there said, contrary to what was before said) shall not pay Tithes; but the Demesns of the Abbey, not parcel of the Glebe, should be chargeable to pay Tithes, if they were not discharged in right of a Composition or perpetual Unity.

Grass pays a Predial Tithe; but if a man cut *Grass*, and before it be made into Hay, being only put into Swathes, he carry it thence and give it to his plowing Cattel for their necessary sustenance, not having otherwise Food sufficient for them; in this case no Tithe shall be paid for the same, and a Prohibition was granted. *Mich.* 9 *Car. B. R. Crawley & Wells per Curiam*. The Case was, where *J.* Libelled in the Ecclesiastical Court for the Tithes of the Profits which came of the *Grass* and herbage of Pasture-Land, and upon a Prohibition granted, *P.* suggests, That he did feed on that *Grass* & Pasture with his own Plough-Cattel, and with the Plough-Cattel of other men in the same Village. *Noy*, Consultation shall be granted; for though a man shall not pay Tithes for the Cattel of his Cart, yet he

he shall pay Tithes for the Land whereon they do feed. *Doderidge* Justice, Where I do agist Cattel, and take the Cattel of other men to eat up my *Grass* and Pasture, there I shall pay Tithes for the *Grass*; otherwise it is, where the *Grass* is only such as I do depasture with my own working Cattel. *Crook* cited *Sherington* and *Fleet-wood's* Case, where a man agists other mens Cattel on his Meadow-ground, whereof he paid Tithe-Hay afore-time; and it was Resolved in this Case, That he shall not pay Tithes for that Meadow-ground now fed with other mens Cattel after Harvest, no more than if he had depastured the Land with his own Cattel.

Trin. 18 Jac.
B. R. *Johnsen*
& *Parker's*
Case.
Roll. Rep.

Gravel is not Tithable. *Mich. 19 Eliz. B.R. Pasch. 34 Eliz. C. B. Liff and Wair's* Case.

Grain is computed among the Predial Tithes, which is to be let out according to the Statutes and the usage of the place, *Brownl. 1. 14.* which holds true of all sorts of *Grain* in all grounds within the Parish; The Law is the same touching Hay in Meadows.

Grounds let to Strangers out of the Parish, the Tenth-peny of the Rent is commonly payable to the Parson, if no Custom against it. Or *Ground* within the Parish let to a Stranger without the Parish, is Tithable by the Owner of the Cattel, unless the Custom there be otherwise. Or if the *Ground* be fed with Cattel that bring no profit to the Parson, the Owner thereof must pay Tithes for them. Or *Ground* fed with the Cattel of a Stranger within the Parish, which brings profit to the Parson or Vicar, he is to pay Tithes for it; the Case, therefore seems the same, if both the *Ground* and the Cattel be his own that is the Stranger, in case he work them in another Parish. But the Studs of *Ground* or the Meers thereof at the Ends of Land, and adjoining to the Arableground, are not Titheable where the Land it self pays Tithe, unless where being mowed for Hay, it hath used to pay Tithes.

Mich. 8 Jac.
C. B. *Baxter's*
Case. & Trin.
9 Jac. B. R.

H

HAY pays a Predial Tithe, and is to be Tithed in Swathes, Windrows, or Cocks, as the Custom of the place is. Or if the Custom be to measure out the Tenth part, as the Grass grows on the Land for Hay, the Custom is good; and the Tithe of Hay may be set forth in Grass-Cocks, where the Custom doth not oblige to make it into Hay-Cocks. (a) And if Hay be put into Ricks on the ground, and after sold, the Buyer cannot be sued for the Tithe; the Seller may, in case the Tithe thereof were not paid before, *Hill. 16 Jac.* by three Justices in *Ashfield's Case*. And where two Crops of Hay are had from the same ground in the same year, Tithe shall be paid as well of the latter as of the former. (b) Also Tithe shall be paid of the Hay made of Grass growing in Orchards. *Co. 2. Infit. 652.* But no Tithe Hay shall be paid for the Grass growing upon Headlands, which are only large enough for the turning of the Plough; (c); but not for Grass cut in Meadows to feed the Beasts of the Plough, and not made into Hay, *Trin. 1 Car. B.R. Wells* vers. *Crawly*. Yet on some Headlands Tithe may be payable of Hay; for suppose that in an Arable Field there be much Grass on the Headlands thereof, and there be a Prescription to pay the Tenth Shock of Corn there for all the Hay on the Headlands and Rakings of the Corn, and for Tying of Horses on the Headlands, such Prescription was held good to discharge the Tithe of the Hay upon such Headlands. (d) And although a Second Crop of Hay from the same ground the same year is Tithable, as aforesaid, yet regularly the Hay for the Aftermath pays no Tithe, except there be a Special Custom for it; the Rule being, That Tithes shall be paid *Ex annuatis renovantibus simul & semel.* (e) And where the Custom is not otherwise, the Parishioner ought to make the Grass into Hay for the Parsons Tithe. (f) Yet when the Tithes of Grass are severed from the Nine parts, the Parson *de jure* may make it into Hay upon the Land where it grew, and that *de jure*, as well as the Parishioner himself; and so Adjudged in the Parson of *Columpton's Case* in *Devon*, and the Prohibition denied accordingly; where the Parson had alledged a Custom of doing so, but the Court held that to be needless. *Hill. 14 Jac. B. R. Newbery* and *Reynold's Case per Curiam*. And in this case it was held, That the Parson may go over the Parishioners ground in the Path-way to make the said Grass into Hay, for that is incident to the Tithes. A man is not bound to make into Hay the Tithes of the Grass which he cuts; but he may set

(a) Roll. 1.
644. y. 1356.

(b) Roll. 1.
645. 2. 11, 12,

13.
2. 8. 1. 1. 1. 1.

(c) Roll. 1.
645. 2. 19.

(d) Leon. 2.
93.

(e) Hob. 250.

(f) Pasch. 13.
Jac. B. R.
Roll. Rep.

set

Bar Libelled against a Parishioner for Tithes of certain Stables, &c set forth in his Libel, That of Common right and Prescription time out of mind, the Parsons there had used to have a *Modus Decimandi*, after the rate of the Tenth-part of the yearly Rent or value of the same. It was the Opinion of the Court, That in this Case a Prohibition should be granted; for *de Communi jure* no Tithes are to be paid of the yearly Rent or value of *Houses*; for Tithes are paid of the revenue and increase of things; and therefore no Tithes are paid for *Houses* in any Cities or Towns in *England*, saving in *London*; and this Parish is out of *London* and the Liberties thereof: Now where there is no Tithe at all, there can never be a *Modus Decimandi*; and yet it seems this kind of Payment hath been long used in *London*, which certainly was by use. But for *Houses*, Oblations were paid in all places; which are now by the Stat. brought to a certainty, viz. 4*d.* for a House. *Trin. 12. Jac. C.B. Dr. Leyfield and Tindall's Case. Hob. 10. 11.* In *Green and Piper's Case* it was agreed by the Justices, That a House in *London*, which was parcel of the Possession of a Priory, which was discharged of the payment of Tithes, should by the Stat. of 37 H. 8. be charged with the same. One who was a Curate and Sequestrator only of the Rectory of *D.* in *London*, the Incumbent being suspended, Sued Four of the Parishioners in the Ecclesiastical Court for Tithes of their *Houses*, and not before the Mayor of *London*, according to the Statute of 37 H. 8. The Court doubted of it, especially because the party was neither Parson nor Vicar, and because the Statute is a New Law, and appoints how the Tithes in *London* shall be paid and Ruled, and before what Judges, and what Remedy shall be for the party grieved; and day given to hear Counsel on both sides. (n) In the Case aforesaid between *Green and Piper*, (o) when Suit was in the Ecclesiastical Court for the Tithes of a House in *London*, a Prohibition was prayed upon a Surmize, That the House was a Priory, which was discharged of Tithes by the Popes Bull, and the Stat. of 31 H. 8. which gave their Possessions to the Crown, did Ordain, That the King and his Patentee of such Lands should be discharged of Tithes; yet a Consultation was awarded, because by a latter Stat. viz. 37 H. 8. cap. 1. all Houses in *London* shall pay Tithes according to their Ordinances, and the Statute extends to all Houses, and none excepted but the Houses of Noblemen.

(n) Mic. 16.

Car. B. R.

Cro. par. 3.

(o) More 1218.

L.

L *Amb*s are computed among the Mixt Tithes. To pay Pence a piece for *Lamb*s, when the number is less than Seven, is a good Prescription. *Curia 7 Jac. B.R. Patche's Case*. Or rather thus, viz. if the Parishioner hath Six *Lamb*s, or under, he shall yield for Tithe a half-peny for every *Lamb*: if he hath Seven *Lamb*s, then he shall yield a *Lamb* for his Tithe, and receive three half-pence from the Parson: if Eight *Lamb*s, then a penny: if Nine *Lamb*s, then a half-penny from the Parson, who may otherwise expect the Fall of the Tenth *Lamb* the year next following. *Lindw. cap. Quoniam propter*. Also the Tithe of *Lamb*s is to be apportioned with respect to the places where they were engendred, brought forth, and nourished. *Lindw. cap. Quoniam audivimus*. And regularly the time of payment is, when they are weaned from the Dam, unless the Custom of the place otherwise. To stay a Suit in the Ecclesiastical Court for the Tithe of *Lamb*s, a Prohibition was prayed, upon a Surmise the Custom to be, That if one hath *Lamb*s under the number of Seven, he ought to pay a half-peny for every *Lamb* in lieu of all Tithes of *Lamb*s; if he hath but Seven, then the Parson to have the Seventh, and he to pay Three-pence; if Eight, then Two-pence; and if he had Ten, the Parson shall have the Tenth without paying any thing: Resolved, That this being a Custom, which they refused to allow in the Ecclesiastical Court, a Prohibition should be awarded (p).

(p) Pasch. 11.
Car. B. R.
Cro. p. 3:

Lands accruing to the Crown by the Statute of 27 H. 8. touching Dissolutions are now Tithable, though whilst they were the Lands of Religious Houses they were not Tithable; but their Privileges being Personal, they were extinguished by the said Statute of Dissolutions, nor hath the Statute of 31 H. 8. any retrospect to the said Privileges. 15 *Jac. C.B. Garret & Wright's Case*. & 7 *Car. B. R. Clark and Ward's Case*. *Vid. Sr. Marmad. Strickland's Case* 1639. Adjudged at York Assize according. *Vid. Clayton's Rep. 117.* & 12 *Car.* Adjudged in another Case. Also *Lands* gained from the Sea, and made Arable, must pay Tithes. *Bulstr. 8. 165*. So must *Lands* in themselves Tithable, but not Manured or Ploughed, specially if so in prejudice to the Parson; in which case he may Sue the Occupier of such *Lands* in the Ecclesiastical Court for the Tithes of that Land. *Vid. 15 Car. C.B. per Berkley Justice* Adjudged.

Lops

Lops of Trees above twenty years growth shall pay no Tithes; (q) For it hath been held, that if a man *Lop* a Tree under twenty (q) *More*. 158. years growth, after suffer the Tree to grow past twenty years, and then *Lop* it again, no Tithe shall be paid for the second *Lopping*, although the first *Lopping* were not Tithe-Free. (r) It was Resolved in *Reynold's Case*, That Tithes shall not be paid of the *Lopping* of Trees above twenty years growth. *More's Rep.* (r) C. B. by the whole Court. Brownl. 1. pa. 23.

Lime is not Tithable; *Adjudg.* 19 *Eliz. B.R. & Pasch.* 34 *Eliz. C.B. Liff and Watt's Case*: Nor *Marle, Bricks, Slates, or Tiles*, unless the Custom of the place make them Tithable; otherwise not, because they do not annually increase, and because *Lime* is part of the Freehold. *Mich.* 13 *Jac. B. Thomas & Perrye, per Curiam.*

M.

M*ast* of Oak or *Beech*, if sold, the Tenth-peny is payable for the Tithe thereof; but if eaten by Swine, then the Tenth of the value or worth thereof.

Meadows by ill husbandry over-run with *Thorns, Bushes, &c.* the like, are not computed as Barren Lands, but do still remain Tithable. *Hill.* 38 *Eliz. B. R. Sberington and Fleetwood's Case. Vid.* 15 *Car. B. R. Sugden and Cottle's Case.*

Mills, the Tithe thereof, as also of Parks, Ponds, Warrens, Dove-coats, and Bees, seem *primo intuitu*, as if they were all Predial Tithes. For the Tithe of *Mills*, not the Tenth penny-Rent, but the Tenth Measure of Corn grinded at the *Mill*, is responsible for the Tithe; understand it of *Corn-Mills*, whether new or old, driven by Wind or Water, for the Tithe whereof generally the Tenth Toll-dish is due, if there be not some other Custom in the place. And whereas by the Law and the ancient Constitutions of the Church Tithes were not paid of Ancient *Mills*, yet by the Statute of *Articuli Cleri*, cap. 5. Tithes are to be paid for all *Mills* newly erected: so that *de Molendino de novo erecto* Tithes shall be paid. *Trin.* 14 *Jac. B.R.* So that all new *Corn-Mills*, be they Wind or Water-*Mills*, also *Fulling Mills, Paper-Mills, Powder-Mills, Stamping-Mills,* (and probably for the same reason *Saw-Mills*) *Iron-Mills*, and all others that are of Common and Publick use, do pay Tithes; but old *Corn-Mills*, for which no Tithe was ever paid, no Tithe is to be paid, except a Personal Tithe, as is for a Trade of profit: And such Tithe shall be paid of *Fulling-Mills, Rape-Mills, Paper-Mills, Iron-Mills, Powder-Mills, Lead-Mills, Copper-Mills, and Tin-Mills*; for such *Mills* pay no Tithe as *Mills*, because they are but

En-

English of their occupation, *Case* in *Jes. Johnson's Case*, & *Cro. 2. 512* & *Bulst. 321* *Pl. Co. Fac. M. B. 1. L. Co. & Co. 1. 1. 1.* only the *Miller* is to pay Personal Tithes, as is said, as for a Handicraftsman's Tithes, as for a Fulling-Mill as such pays no Tithes. *Hill. 16* *Jac. B.R.* between *Dawbridge* and *Johnson*, Parson of *Buckfield*. For there being a Fulling-Mill, which Fulls 40 Cloths a week, and gained two shillings for every Cloth, it was held, that there was no Tithes to be paid thereof. *Cro. 2. 512*. *Case* 2638. But a Corn-Mill newly erected, though upon Land discharged of Tithes by the Statute of *Manasseth*, must pay Tithes; & so of every new erected Mill on a man's own ground. *144 Co. 1522*. Notwithstanding the Premises it seems somewhat questionable, whether any Tithes are due for Mills *de jure*, or not; for the *L. Coke*, *Instit. 2. par. 622*. says it was never judicially determined that ever he knew of. If Mills do not yield a Predial Tithes, yet doubtless the *Miller* are to yield a Personal Tithes, as well as other Handicrafts-men; but Custom in this, as in other cases, prevails. It hath been Adjudged. *Trin. 18. Jac. B.R.* That where a Parson Libelled in the Ecclesiastical Court for Tithes of a Mill, which was erected upon Lands which were discharged from payment of Tithes by reason of Privilege within the Statute of 3. H. 8. That a Prohibition would not lie in that case: for that *De Molendino de novovereto* Tithes ought to be paid. *Mich. 15 Eliz. in Hagen's Rep. acc.* But in the other Case of the Fulling-Mill aforesaid, where the Parson Libelled in the Ecclesiastical Court for the Tithes thereof, & suggesting, that the *Miller* Fulls every week 40 Cloths as aforesaid, and gained two shillings of every Cloth, demanded Tithes for them: A Prohibition was granted in that case; for it was said by the Justices, That by the Law of the Land he ought not to pay Tithes of such Mills; for of such things as come only by the labour of men, Tithes are not payable, but of things which are receivable every year. *dict. Case Dawbridge & Johnson. Cap. par. 2. 523*. And in another Case, where a man Libelled to have Tithes of Mills upon a Suggestion of a *Modus Decimandi* for the same, a Prohibition was granted: In that Case it was said, by *Coke* Chief Justice, That in some cases Tithes is payable for Mills; and in some cases not. No Personal Tithes by the Statute is to be paid of Mills, but where by special Usage the same hath been paid; and whereas a *Modus Decimandi* was alledged to pay Tithes for Mills, it was Resolved; That the *Modus* did not extend to Mills newly erected, upon the Stat. of *Articuli Cleri*; for *De Molendino de novovereto servatur Decima. Trin. 14. Jac. B.R. Fakes Case. Bulst. pa. 3. 312*. If two Fulling-Mills be under one Roof, and a Rate-Tithe paid for the Mills, and after you alter these Mills, and make one of them a Corn-

Corn-Mill, the Rans-Tithe is gone, and you must pay Tithes in kind. *Brownlow p. 1. Scales's Law.* If there be two ancient Corn-Mills time out of mind, &c. for which 6 s. 8 d. have been paid for the Tithes time out of mind, &c. and after in continuance of time the Mill-stream doth change his course, and gets another way at a little distance from the ancient Stream, and thereupon the Owner of the Mills pulls down one of the ancient Mills, and new builds it in that other place where the stream now runs: In this case it shall be discharged of any Tithes by the force of ancient *Moder*, for that happened by the act of God, and not by the act of the party; and Prohibition was granted accordingly, *Mieb. 11 Car. B. R. Johnson and Dawbridge's Case, Resolved per Curiam.* But withal the Court held, that if the Stream had been altered by the Owner, Tithes ought to have been paid as of a new Mill. In another Case it being Libelled in the Ecclesiastical Court for Tithes of a Grift-Mill, and of a Fulling-Mill, *Crook* agreed, That for a Grift-Mill Tithes shall be paid; but he said, That the Statute *De Aviculis Cleri*, which speaks *de Molendinis non fiat Prohibitio*, ought not to be meant or intended of a Fulling-Mill, for the profit that accrues by that, is by the Labour of men, and therefore not intended within the general words of the Statute *De Molendinis*, for which reason he prayed a Prohibition. *Calstrop* said, that it was the opinion of Justice *Warburton* and *Nichols*, 12 *Jac.* that Tithes shall be paid of Fulling-Mills, viz. the Tenth-peny of the gain or profit; but of Grift-Mills the Tenth-dish or Corn shall be paid, for that is in the nature of a predial Tithe: And so it was held 7 *Jac.* in the Case between *Ubi* and *Lux*, *Vid. Lindw. Provim. Constat.* But yet *Doderidge* held, That if there be not a Special Custom alledged for the payment of Tithes of a Fulling-Mill, Tithes shall not be paid thereof; for he had spoken (as he said) with the *Civilians*, who held that Tithes should be paid of such a Mill; but they could not agree what manner of Tithe it is, for some said it is a predial Tithe. Others, that it is a personal Tithe; but he said it could not be a predial Tithe, for it wholly accrues by the labour of Man; and if so be that he should have that Tithe as a predial Tithe, then another Tithe would be demanded of him who Sheers the Cloth, and also of the Dyer thereof, and so Tithes should be paid many times for the same Cloth: But the Usage or Custom of the Country is to be considered. And for Tin-Mills, or Lead-Mills, or Plate-Mills, Ragg-Mills, or Edge-Paper-Mills, no Tithes shall be paid; and to this agreed *Doderidge*, *Houghton*, and *Croke*: And therefore as to the Grift-Mill, a Consultation was granted, and as to the Fulling-Mill, there was a Prohibition. *Paseb. 17 Jac. B. R. Roll. Rep. par. 2.* A Parson Libelled in the Ecclesiastical

Court for Tithes of a *Mill*, which was erected upon Lands discharged of Tithes by the Statute of *Henry VIII.* A prohibition was prayed, but refused by the Court; for as *modus* is *ab eo erecto non facit prohibitionem*. *Term. 15 Jac. B. R. Cro. par. 1.* Also in another Case where it was moved for a Prohibition, upon a Suggestion of a *Modus* to pay so much by a Custom for all *Mills* erected, or to be erected, and this appearing to be a New erected *Mill*. Whether the Custom shall run to this or not upon the Statute of *Articuli Cleri*, was the Question. *One Chief Justice*, This *Modus* cannot go to this new *Mill*; for an ancient *Mill* your *Modus* shall be allowed; but not for the *Mill* newly erected, the Custom will not extend to it; and therefore by the Rule of the Court, for this new *Mill* a Consultation was granted.

Millstones, if one pair thereof be turned into two pair, both of them shall pay Tithes, and their Privilege (if they had any) will be lost. *Parker vs. Johnson's Case, 6 Prob. N.B. IG. 40. 11. 17. Brookes vs. 1. 13. 1780* that if there be but one pair of *Millstones* in a *Mill*, and a Rate Tithes be paid for them, if afterwards there be another pair of *Millstones* put on, now Tithes must be paid in kind.

Milk paying Tithes, exempt the payment of Tithes Cheese made of the same *Milk*. *Ex contra*

Minerals of Iron, Brass, Tin, Lead, Copper, Coles, and the like, are not Tithable. *Register 51. F. M. B. 53. 9. Bro. Difmes. 18.*

Mixt Tithes are the profits of such things as arise partly from the labour and care of men, and partly from the Earth whereof the things are; and sometimes are called *media Medietas*, and come not immediately of the Ground, but of things maintained out of the Ground, as Cattle, Calves, Lambs, Kids, Wool, Milk, Cheese, Chicken, Geese, Ducks, Swans, Eggs, &c. *Mixt Tithes* are properly such as some of Milk, Cheese, &c. *Or ex sententia animalium, que sunt in pastura, et in gratia pasturatur, ut in Arbo. Philis. Hædæ, Cupressis, Pallis, &c. Coke upon Litt. 626.*

Modus Decimandi is the payment of something in lieu of the just and full Tithes of a Thing Tithable, legitimated by Composition, Custom, or Prescription; it is when Lands, Tenements, or Hereditaments have been given to the Parson and his Successors, or an Annual certain Sum, or other profit always time out of mind to this Parson and his Successors, in full satisfaction of all Tithes in kind in such a place, and all precedents in Prohibitions in discharge of Tithes in case *De modo Decimandi* run thus, viz. That such a Sum hath been always paid in plenam Contentionem, Satisfactionem & Exonerationem uniusmodi & singularium Decimarum. And although

the Sum be not paid, yet cannot the Parson sue for Tithes in kind, not for the Tithes in kind in the Ecclesiastical Court, but for the money in the Temporal. *Term 21 Jac. in the Case Damodar Decimandi* Prohibition debated before the K. *Coke, Select. Cases 408 & 461 in Bick. Case* it was Resolved, where a Prohibition is awarded upon a Suggestion of a *Modus Decimandi* & a Consultation awarded for not proving the Suggestion within Six months, there a new Prohibition shall not be awarded upon an Appeal in the same Suit. *More 1232.* This *Modus Decimandi* refers only to the Realty, viz. the Tithes, & not the Personality, viz. the Offerings. (p) Nor can it begin at this day, but is & must be by Prescription, and is intended to have a lawful commencement upon some Agreement at first made for valuable Consideration with the Parson or Vicar. (q) And if the *Modus Decimandi* be to pay a Sum of money for the Tithes of a piece of Ground, which is after turned to Houses and Gardens, the *Modus* continues. (r) Yea, it doth so actually discharge and extinguish Tithes, that they are thereby turn'd into a Lay-Fee, as well as the Nine parts. (s) Touching this *Modus Decimandi* there are sundry things that seem doubtful and unresolved in the Law, as if the *Modus* be of Land given to the Parson in satisfaction of Tithes, and the Land after happen to be extinct, Q. if the Tithes in kind do not in such case revive? (t) Or if Lands be once discharged of Tithes by a *Modus Decimandi*, Q. whether the Tithes shall revive again upon failure of the *Modus*? (u) But if Land be granted to the Parson in satisfaction of Tithes, if the Parson alien the same without the consent of the Patron and Ordinary, his Successor shall have *Fur et Terrum*. (w) If a man Prescribe to pay a *Modus Decimandi* for the Tithes of certain Lands, if the Land be afterwards let to Farm, and the Farmer pay the Tithes in kind, yet it shall not destroy the Prescription as to the Lessor. (x) If a Lessee pay Tithes in kind, yet that shall not destroy a *Modus* in the Lessor. But if the *Modus Decimandi* be of a thing for which no Tithes is due *de Communijure*, it is not good; nor can it stand to rise and fall according to the Rent by Prescription: as of Houses in London. (y) That the Trial of *Modus Decimandi* (as the Common Lawyers affirm) belongs to the Temporal, not the Spiritual Courts, and for the grounds of Prohibitions in such case †. If the Ecclesiastical Court allow not of any such thing as a *Modus Decimandi*, it is because the Canonists do hold Tithes to be due *Jure Divino*, and consequently not extinguishable in the whole, nor diminishable in part by any Custom or Prescription in opposition to the Law of God. The Temporal Courts will admit them also to be *Jure Divino*, but do allow it to be only *Secundum quid*, viz. *quoad sustentationem Clerici*, but not *quoad Decimam aut aliquam aliam certam portionem*.

(p) March. 31.

(q) Mich. 6

Jac. C. B.

Mildman and

Huttons Case.

(r) Co. 11. 16.

(s) Hob. 42. &

Benloes 169.

(t) Cafe Hoop.

er vers. Andrews.

Roll. Rep.

(u) Vid. Hob.

39.

(w) diq. Cafe

Hooper vers.

Andrews.

(x) Pasch. 13

Jac. B.R. Cafe

Mascul and

Price.

Roll. Rep.

* Pasch. 13 Jac.

per Coke, ibid.

(y) Hob. 11.

† Vid. The

grand dispute

before the K.

between the

Judges of both

Laws.

Trin. 7 Jac.

Co. lib. 3.

and therefore do admit of a *Modus* as to the *quantum*, where there is a sufficient maintenance for the Clergy besides; which is not only allowed, but also confirmed by Act of Parliament. So that if the Lord of a Mannor grants parcel of his Mannor to a Parson, he is to be quit and discharged of Tithes; and makes an Indenture, and the Parson with the assent of the Ordinary (without the Patron) grants to him, that he shall be discharged of Tithes of his Mannor for that parcel of Land; if afterwards the said Lord of a Mannor or his Assigns be sued in the Ecclesiastical Court for Tithes of his Mannor, he or his Assigns shall have a Prohibition upon that Deed; and therefore, if the Lord of the Mannor hath always holden his Mannor discharged of Tithes, and the Parson had time out of mind Lands in the same Parish of the Gift of the Lord, of which the Parson is seised at this day in Fee, in respect of which the Parson nor any of his Predecessors ever had received any Tithes of this Mannor: If the Parson now sueth for Tithes of this Mannor, the Owner of the Mannor shall shew that Special matter, that the Parson and his Successors time out of mind have holden those Lands of the Gift of one who was Lord: and the same is good Evidence to prove the Surmise in the Prohibition (a). And in another Case of a *Modus Decimandi* it was holden by the Court, That in a *Modus Decimandi* be for Hay in *Black-Act*, and the party soweth the same with Corn seven years together, the same doth not destroy the *Modus Decimandi*; but the same shall continue when the same is made again into Hay: And when it is sowed with Corn, the Parson shall have Tithe in kind; and when the same is Hay, the Vicar shall have the Tithe-Hay, if he be endowed of Hay (b). And where a Suit was in the Spiritual Court by a Defendant Vicar of A. for Tithes: a Prohibition was prayed upon the Plaintiffs Plea there of a *Modus Decimandi*, to pay so much yearly to the Parson of A. in discharge of his Tithes. It was the Opinion of the Court, That this *Modus* between him and the Parson will not discharge him from payment of Tithes to the Vicar, and therefore the Court granted a Consultation (c). Also if a Prescription be laid to pay a *Modus Decimandi* to 100 Acres, or to several things, if there be a failure of one Acre, or of one thing, it is a failure of the whole Prescription (d).

Monasteries under 200 *l. per Ann.* commonly called the Lesser Monasteries, or of the Order of *Cisterciens* and *Præmonstratenses*, that were Dissolved and came to the Crown by the Statute of 27 H. 8. were not discharged of the payment of Tithes by the Statute of 31 H. 8. c. 8. (e) by which Statute those of 200 *l. per Ann.* and upwards, commonly called the Greater *Abbeys*, were Dissolved; and whereby it is Enacted, That the King and his Pat-

teentes,

* St. 2 Ed. 6.
c. 13.

(a) 6 Jac. C.B.
in the Case of
Modus Decimandi
Coke Select
Cases 140, &c.
46.

(b) Trin. 10
Jac. C.B.
St. 2 Ed. 6.
Godfr. 396.

(c) Mich. 14
Jac. C.B.
Winter 1533
Childs Case
Bulstr. 3 par.
220, 221.

(d) Adjudg'd
15 Car. in *Sir*
Arthur Robin-
son's Case
Claytons Rep.
Sec. 135.

(e) Jones
§ 73. 188.

tenures, having any Monasteries, &c. or any Mannors, Lands, &c. belonging to them, should enjoy the same discharged of the payment of Tithes in as ample manner as the said *Abbots, &c.* (f) who were (f) Stat. 31 H. discharged of Tithes either by Bull, Composition, Prescription, cap. 8. Order, or Unity of Possession. And albeit the Lands of the said Lesser Monasteries are not within the benefit of the said Statute of 31 H. 8. to be quit of Tithes, yet they ought to enjoy all such Priviledges as are annex'd to the Lands, for which reason they shall (in whose Possession soever they are) be exempted from the payment of Tithes by real Compositions and Prescriptions *de Modo Decimandi*, though not by Prescription *de non Decimando*, Unity of possession, Order, or Popish Bulls, in all which Cases the Parsons and Vicars have the advantage by the Dissolution of all those Monasteries and Abbies, which were Dissolved by the Statute of 27 H. 8. For these Lesser Monasteries under 200 l. per Ann. which were (as aforesaid) Dissolved by the Statute of 27 H. 8. lost their priviledge of being Discharged of the payment of Tithes. Nor did the priviledge extend to any Lands, other than such as they had at the time of the Council of *Lateran*, and only for such Lands as were in their own Mannours (g). It is said in *Dicken's Case* (g) 18 Eliz. against *Greenhouse*, That Monks are not of Evangelical Priesthood, viz. capable of Tithes in peramancy, but meer Lay-men, and cannot prescribe *in non Decimando*. And that *Bede* saith of them, That they are meer *Lates*, and the Monks of the Order of *Præmonstratenses* were such, and therefore they could not prescribe to be Discharged of Tithes (h).

Mortuaries, in some places called *Corse-Presents*, though they are not Tithes, yet they were given *pro Recompensatione subvætionis Decimarum personalium, nec non Oblationum*. Lindw. c. Statutum & *infra*, &c. for which reason they are not here omitted out of this Catalogue of Tithes. *Mortuaries* (as Sir *Edw. Coke* conceives) were not anciently due otherwise than by Custom only (i), until they were settled by the Statute of 21 H. 8. cap. 6. whereby it is Enacted, That no man dying possessed of Goods under the value of 6 l. 13 s. 4 d. should pay any *Mortuary*, nor any to be paid but in such places where they used so to be, and that but one *Mortuary*, nor that, but in one place, and that where the party deceased had his most constant abode, and usual dwelling and habitation, after the rate following, viz. 3 s. 4 d. where the Deceased had in Moveables (his Debts first paid) to the value of 6 l. 13 s. 4 d. and under 30 l. at his death, 6 s. 8 d. if he died possessed of Moveables to the value of 30 l. and under 40 l. 10 s. if to the value of 40 l. or upwards. And none to be paid by any married Woman, Child, Non-

House-

Vid. Sir *Sir*
Dugge's Law of
Tithes:
chap. 21.

(g) 18 Eliz.
Dyer 349.
Co. 2. par. 44.

(h) *Hill's Case*
B.R. in *Dicken*
son and *Green*
house's Case.
Poph. 157.

(i) Co. 2. par.
last. 491.

Co. 2. par. 491.
Bulfinch's Case.
11 Rep. 102.
11 Rep. 102.
11 Rep. 102.
11 Rep. 102.
11 Rep. 102.
11 Rep. 102.
11 Rep. 102.
11 Rep. 102.
11 Rep. 102.

(k) St. 21 H. 8.
c. 6.

(l) Co. Inst.
2 par. 491.

Vid. Spelm.

Judicious Con-
jecture upon
this point of
Mortuaries, as
in his Treatise
de Sepultura,
pag. 35.

Housekeeper, Wayfaring-man, or Non-resident in the place where he died. Which Statute provides, That accustomed *Mortuaries* should be paid as formerly, whether more or less than is before limited (k). There were also in some certain *Mortuaries*, which the Prelates anciently paid to the Kings of this Realm (l).

A *Mortuary* is not properly and originally said to be due to an Ecclesiastical Incumbent, Parson, or Vicar, from any but those only of his own Parish, to whom he ministrerth Spiritual Instruction, and hath right to the Tithes. *Induried in his Gloss on a Statute, ver. ut infra, de Consuetud.* discover the ground or reason of that payment to be this, viz. That when through ignorance, and sometimes through negligence, and unjust detention of Tithes and Oblations the Parsoner was found tardy and faulty, &c. *Ideo statuit Archiepiscopus, quod Compensatione sic subtraheretur, secundum melius Animal defuncti Ecclesie Annua debuit applicari.*

But all this notwithstanding, we know the prevalency of Custom to be such, that in some places of this Kingdom they are paid to the Incumbents of other Parishes, that perform no Ministerial duties at all to the deceased party, nor living nor dying. And the Statute of 21 H. 8. c. 6. doth nothing at all controul the course, but makes the Usage of payment only to be the Law thereof.

In the Case of a Prohibition, because the Defendant sued in the Consistory Court of *Chester*, before the Commissary, for a *Mortuary*, after the death of every Priest within the Archdeaconry of *Chester*, the best Horse or Mare, his Saddle, Bridle, Spurs, his best Gown, his best Signet or Ring, his best Hat, his best upper Garments under his Gown, as to the Bishop, *de debita consuetudine fore supponitur*, and recites the Statute of 21 H. 8. concerning *Mortuaries*. The Plaintiff averred, that there was no such Custom there, and that she had paid a *Mortuary* to the Parson of *B.* and that after a Prohibition the Defendant had prosecuted his Suit in the Ecclesiastical Court. The Questions were, (1) Whether there was a Custom in that place, to give such things for *Mortuary*? and this to be a just cause to have Prohibition; *Mortuaries* being only Triable in the Ecclesiastical Court. (2) Whether Consultation shall be granted without answering the Prohibition. The Court was divided in Opinions, wherefore ordered the Defendant should Plead or Demur, and then the Court would give Judgment upon the Return before them.

Hinde and the
Bishop of
Chester's Case.
Cro. par. 3.

the Precious and originally paid to be due to the King of this Realm (4). There were also in some certain Manors, which should be paid as formerly, whether more or less than at present. Which Precious provided that it is not properly and originally paid to be due to the King of this Realm (4).

Nag, or Riding Nag: If a man keep a Nag or Horse within the Parish only for his Saddle to ride on, no Tithes shall be paid of that Nag or Horse, for that it is a Barren Beast, not renewing, but kept only for Labour; and so Adjudged in the Parson of *Thimblethorpe's Case*, where the Case was, That a man Leased out certain Lands to another, reserving to himself the running of a Nag for his own Riding; and after the Lessor was sued in the Ecclesiastical Court for the Tithes of that Nag, and a Prohibition was granted by *Montague, Crook, and Doderidge*, for that it is a Barren Creature, and used only for Riding (and although it was argued at the Bar, that the Lessee paid him Tithes for all the Herbage; yet the Court took no advantage of that.) But *Houghton* seemed *à contra*; for it seem'd to him, That no Barren Cattel should be discharged of Tithes, other than such as are used for Husbandry. But that was not used for Husbandry. *Ergo, &c.* And in the Case of a Prohibition between *Hampton and Wild*: It was Resolved, That Tithes shall be paid for Pasturage of a Gelding for his Saddle, or if it be sold; but not for Horses used only for Labour.

Trin. 13 Jac.
B.R. *Lumley*
Parson of
Thimblethorpe
and *Wilde's*
Case.

Cro. par. 2.

In a Prohibition the Case was, *M.* the Defendant being Parson of *D.* did Libel in the Ecclesiastical Court for the Tithes of *Sylva Cædua*, and of the Herbage for depasturing of his Geldings: The Plaintiff shewed, that they were his Hackney Geldings, which he kept for his pleasure, and for himself and his Servants to ride upon, bring his Saddle-Horses; and this Plea being there refused, for this cause he prayed a Prohibition: *The whole Court was clear of Opinion*, That here was good cause for a Prohibition, for that these Horses are not Tithable, nor any Tithable Herbage is to be paid for them; otherwise it were, if they had been Cart-Horses, which he had to Till his Ground, or for Cattel bought, and Fatted to sell again for gain; for these he ought to be answerable to the Parson for the Herbage of them, but not for the Herbage of his Geldings by him kept, and used only for his pleasure; but it was for working Horses, for the Cart or Plough, or for Fat Cattel, bought and Fatted to sell again; of such Cattel allowance is to be made for their Herbage, because that a Profit doth come in by them; but otherwise it is of Saddle-Horses: the whole Court agreed in this, and therefore in this case, by the Rule of the Court, a Prohibition was granted.

Trin. 9 Jac.
B.R. *Parhill*
vers. *Mary*.
Bullstr. par. 1.

Nurseries of young Trees and Plants pay Tithes: If a man be seized of Land within a Parish, which used to pay Tithes; and a Nursery be made thereof for young Trees and Plants of divers kinds of Fruit, as Apples, Pears, Plumbs, &c. And of Ash, &c. and after sell divers of them to Strangers out of the Parish to be transplanted, he shall pay Tithes of that Nursery to the Parson; for although the young Trees are parcel of the Freehold, so long as they continue there, yet when they are transplanted, they are severed and taken from the Freehold; and if that should be permitted without payment of Tithes, the Parson might be defeated of the Tithes of all the Lands in the Parish, by converting them into Nurseries. *Hill. 14. Car. B. R. Gibbs & Wilmour Adjudg. per Cur.* upon a Demurrer, and a Consultation granted accordingly. *Instrat. Mich. 14. Car. Rot. 75. Oro. par. 3.*

O.

Oaks beyond 20 years growth, that are become dry and rotten, and thereby not fit for Timber, shall pay no Tithes, because they were once privileged. And if Oaks beyond 20 years growth have been used to be Topp'd and Lopp'd within every 20 years, yet no Tithes shall be paid of these Tops and Branches within 20 years growth, because the stock is discharged of Tithes. *Trim. 38 Eliz. B. R. Ram & Patteson. Mich. 3 Jac. B. Brook & Rogers & Co. 11. Sampson & Worthington, 48. B. Adjudg.* It was also Resolved in *Wray and Glencbe's Case*, That small Oaks under twenty years growth, apt for Timber in time to come, shall not pay Tithes. *Mare's Rep.* Likewise Oaks Top'd within the age of 20 years, and after the Lop left to grow beyond 20 years, no Tithes shall be paid, for it is now become Timber. *Mich. 10 Jac. B. per Coke.* And Oaks decayed that are not Timber, but converted to Fire-wood, shall notwithstanding not pay Tithes. *Mores Case 716.*

Oblations, Obventions, and Offerings, seem to be but one and the same thing, and are in a sense something of the nature of Tithes, being offered to God and his Church of things real or personal. Offerings are reckoned amongst personal Tithes, and as such come by labour and industry, paid by Servants and others once a year to the Parson or Vicar, according to the Custom of the place; or they are to be paid in the place where the party dwells at such four Offering-days, as before the Statute of 2 & 3 Ed. 6. 13. within the space of four years then last past had been used for the payment thereof, and in default thereof. *Cro. 3. Abridg. Case 3159. In London*

don Offerings are a Groat a House. They are by the Law now in force to be paid as formerly they have been: *Wid. Stat. 32 H. 8. y. 27 H. 8. 26. 2 Ed. 6. 13. 2 Ed. 6. 16.* They properly belong to the Parson or Vicar of that Church, where they are made. Of these some were free and voluntary, others by Custom certain & obligatory. They were anciently due to the Parson of the Parish that officiated at the Mother Church or Chappels that had Parochial Rights; but if they were paid to other Chappels that had not any Parochial Rights, the Chaplains thereof were accountable for the same to the Parson of the Mother Church. *Limbs. c. de Oblatione. & cap. quidam.* Such Offerings as at this day are due to the Parson or Vicar at Sacraments, Marriages, Burials, or Churching of Women, are only such as were confirmed by the Statute of 2 Ed. 6. 13. and payable by the Laws and Customs of this Realm before the making of the said Statute, and are Recoverable only in the Ecclesiastical Court.

Orchard, the soil whereof is sowed with any Grain, the Parson may claim the Tithes thereof, as well as of the Fruit of the Trees, because they are of several kinds, and of distinct natures. *Coke Mogu. Chart. 692.*

P. If converted into Tillage, shall pay Tithes in kind, for a

Park is but a Liberty; a discharge therefore of the Tithes of

Park is not a discharge of the Tithes of the very Soil, which may be converted into Tillage. (a) Or if there be a *Modus Decimandi*

of the *Park*, and the *Park* be disparked, and the Land converted into Tillage, or Hop-ground, or the like, in this case though Tithes in kind are not payable, yet the *Modus* shall remain. The Case is the same, if the *Park* be disparked by having all the Pales fallen down

which in Law is a disparking of the *Park*. *Sed Q. (b).* For to pay a Buck or a Doe, or the shoulder of a Deer, when one is killed,

may be a good *Modus Decimandi* for the Tithes of a *Park*. A Vis-
car having two shillings yearly, and the Shoulder of every third Deer killed in a *Park*, the *Park* being disparked, the Vicar sued for Tithes in kind. The Court was divided in Opinion: *Nicholas* and *Hebary* Justice, that notwithstanding the disparking the *Modus* did remain: *Winch* and *Warburton* Justices, that by the disparking the Prescription as to the *Modus Decimandi* was determined, and

that the Tithes should be paid in kind. *Quare. (c)* Where a *Park* is disparked, if the *Park* paid ten shillings, or any other Sum for all

(a) Sharp
verf. Sharp.
Noy. Rep.

(b) Vid. Pasf.
29 Jac. C. B.
Poole & Rey-
nolds's Case.

(c) Cooper and
Andrews'
Case.

u u u

Tithes

* Pasch. 13
Jac. B. R. Mas-
shal & Price.
per Co. Roll.
Rep.

(d) More.

Cafe. 1186. &

Cafe. 1277.

(e) Hil. 6 Jac.

C. B. the Vi-

car of Glare's

Cafe.

(f) Hob. 43.

(g) Roll. 1.

635. c. 4. 67.

Noy. 108. St.

2 Ed. 6. c. 13.

Tithes, and now disparked and toun with Corn, here only the ten shillings shall be paid; otherwise, if the Prescription be for the Deer and Herbage of the Park, and not for all the Park; for in such case Tithes in kind shall be paid, if it be disparked and toun with Corn. A *Modus* to pay so much money for the Tithes of a Park is good, though the Park be Disparked. If one Shoulder of every Deer killed be Prescribed to be paid for all Tithes, and it be after Disparked, here the Tithes in kind shall be paid; or if the Prescription be to pay ten shillings and a Shoulder of every Deer, and it be Disparked, here it shall pay Tithes in kind, and not the ten shillings only. (d) Upon a Surmise of a *Modus Decimandi* to pay a Buck or a Doe for all Tithes of a Park, a Prohibition was prayed, and granted, (e) If a *Modus Decimandi* be to pay two things, as two shillings for a Park, and a Shoulder of every Buck killed in the Park, and all the Deer die, or are kill'd up, yet the Prescription holds good for the two shillings. (f) And Although Tithes are to be paid for a Park, yet Deer, as being *Fera nature*, are not Tithable, saving where the Custom is otherwise. See in *Thursbie's Case*, where Suit was for Tithes Corn growing in a Park lately Disparked, the Defendant pleading a Custom to pay Venison in lieu of all Tithes, and proof that a Buck was paid yearly, but whether out of this Park or not was *Non constat*: The Jury found, That if it was paid out of any Park, and accepted and allowed, this was better to uphold the Custom, than if particularly tied to pay a Deer out of this Park; for now if the Park be disparked, yet this payment of the Deer may be performed. Otherwise it is, if the Custom had been a Deer out of this Park only, for then by the destroying of that, the Custom is gone also. It was holden in this Case by the Judges, that although the Deer had been offered for the most part paid out of this Park; yet this doth not alter the Custom, if it may be paid out of any Park; and if the Custom were to pay a Shoulder of Venison generally, it may come out of any Park (b).

(b) 13 Car.

Tork Assize.

Thursbie's Case.

Clayt. Rep. 91.

Partridges made Tame, do pay not a Predial, but a Personal Tithes.

Pasture yields a Predial Tithes, which is generally paid by the Owner thereof, and so is the Custom; yet Pasture-grounds fed with Cattel that yield profit to the Church, have their Tithes satisfied in the Fruit of the Beasts. And if they belong to a Stranger, who is not of the Parish, if he sell the Pasturage, he is answerable for the tenth Penny; but if he frankly giveth it, and the Parishioner freely receiveth it, the Parishioner is answerable for the Estimation, if the said Grounds be fed with Beasts yielding increase; otherwise no profit at all to the Church, if fed only with Horses, Oxen,

Oxen, and other barren Beasts. And as touching the *Pasture* of the Horses of Guests, the Tithe is to be paid by the Innkeeper for the same (i). But if the said Horses be put into such *Pasture*, as is affected a Crop of Hay of the same ground, no Tithe is payable by the Innkeeper for the same (k). Nor is the *Pasture* of such Horses Tithable as the Parishioner useth for his own Riding, nor the *Pasture* of such Horses as are used about Husbandry in the Parish; but where Horses are kept or bred in *Pasture* that they may be sold, in that case Tithe shall be paid for the *Pasture* thereof (l). But if Tithe be demanded for the *Pasture* of Riding-Nags for the Saddle, for labour and pleasure both; but not for profit properly, a Prohibition will lie (m). Nor is the *Pasture* of Oxen used for Husbandry Tithable, that is, being used for Husbandry in the same Parish; it may be otherwise, if they be used for other purposes, or for Husbandry out of the Parish. *Mich. 8 Jac. C. B. in Buxter's Case*. And as touching Tithe in the *Pasture* of Guest-Horses by an Innkeeper, as hath been formerly mentioned; the Case was, A. Parson of B. Libelled in the Ecclesiastical Court against C. an Innkeeper, because that the said C. took all the benefit of his *Pasture*, by putting Guest-Horses into the same: Whereupon C. prayed a Prohibition, but it was denied by the Court; for that it is Tithable in this case. But it was said, that if C. had taken a Crop of Hay, whereof he paid Tithe, and afterwards had put in his Guest-Horses into the After-pasture of that Ground where such Hay was made, in that case it had not been Tithable, because the Parson had Tithe of the Land before. *Trin. 16 Car. B. R. Richardson and Cobbell's Case. Poph. 142*. Also if a man let out his *Pasture*, reserving the *Pasture* of a Horse for himself to ride about his Husbandry Affairs, Tithe shall not be paid for the *Pasture* of this Horse; but if a man keep and breed Horses in his *Pasture* to sell them, there Tithe shall be paid for the *Pasture* of such Horses. *Trin. 15 Jac. B. R. Larkin and Wild's Case. Poph. 126. Vid. Trin. 9 Jac. B. R. Pothill and May's Case. Bulstr. par. 1. 171. Vid. Agistments. Vid. Grass.*

(i) Tr. 16 Car. B. R. Richardson and Caleb's Case.

Poph. 143.

(k) Ibid.

(l) Hil. 15 Jac. B. R. Hide's Case, &

Bulstr. 1. 171.

(m) Tr. 9 Jac.

B. R. Pothill

& May's Case.

Adjudg. acc.

Bulstr. ibid.

Pease gathered green to eat in the Parishioners Family, no Tithe shall be paid thereof, and that *per legem terræ*: But otherwise it is in case they be gathered to sell, or to feed Swine therewith, in which case Tithe shall be paid thereof. *Pasch. 12 Jac. B. R. per Cnr.*

Pells or *Fells* of Sheep dying of the Rot, are not Tithable without a special Prescription for it: The Case was, A. Libelled in the Ecclesiastical Court for the Tithes of *Pells* and *Fells* of Sheep, which Sheep died of the Rot; a Prohibition was pray'd, and granted to stay proceedings in the Ecclesiastical Court; because such *Pells* are

not Tithable, unless there be a Special Custom for it. *Trim. 3. J. A. R. Ashton and Waller's Case.*

Pheasants that are tame, pay a personal, not a predial Tithes. If a man hath *Pheasants*, and keep them in an enclosed Wood, and clip their Wings, and they hatch Eggs, and breed up young *Pheasants*, no Tithes shall be paid of these Eggs or young *Pheasants*, for that they are not reclaimed, but continue to be *Feræ naturæ*, and would go out of the enclosure, if their Wings were not clipped; and in this case Prohibition hath been granted between *Wandbrook and Evans, Mich. 11. Car. B. R.* It was awarded, that no Tithes are paid of them in a great Circuit called the *Chiltern* in the same County, viz. of *Bucks*, and so prescribe in *non Decimando*; but the Court granted the Prohibition, for that they are *Feræ naturæ*.

Pigeons are Tithable, *Mores Abr. 1270.* But if a man keep a Family, and hath *Pigeon*-holes about his House, and he keep some *Pigeons*, and he kill and spend in his House the young *Pigeons* that are bred there, he shall not pay any Tithes for them. In this Case between *Vincent and Tur, Hill. 13. Car. B.* a Prohibition was granted, and upon the Parsons plea, that the Possessor sold them, a Consultation. For Tithes of *Pigeons* no Prohibition lies, as was Resolved in *Fones and Gasrell's Case, Hill. 15. Jac. B. R. Rel. Rep.* For the Court there said, that Tithes ought to be paid of *Pigeons*, and for Conies, per *Doderidge* Justice, to which the Court agreed. In the Case of a Prohibition for suing for Tithes *Pigeons*, the Defendant in the Ecclesiastical Court pleaded payment; they refuse the validity of that Plea without proof by two Witnesses; the Court said, it would be a great inconvenience to bring two Witnesses to prove payment of every sort of Tithes; wherefore a Prohibition was granted. *Malary and Marius Case, Cro. per 1.* And in another Case a Prohibition was prayed, where the Parson sued in the Ecclesiastical Court for Tithes of *Pigeons*, and awarded to stand because the Court there would not allow the proof without two Witnesses. *Mores Abr. Case 1208.* Probably the same Case with the former. *Vid. Doves.*

Pigs, if there be but Nine, as also *Culvers*, if there be but six, and the like, under the number of Ten in one year, the Parson can have no Tithes thereof in kind that year, without a special Custom for it; but must have his Tithes *pro rata* either in money the same year, if there be any Custom for it, or in kind the next year, reckoning both years together, *Mich. 7. Jac. C. B.* *Pigs* are accounted a predial Mixt Tithes. *Mich. 8. Jac. C. B.*

Pits of Stone, Lime, Gravel, Marble, Marle, Chalk, Cole, and the like, are not Tithable; for the Land must not pay a double Tithes. *Regist. 1. F. N. B. 3. 9. Bro. Dissem. 18.*

Plants

Plants on young *Plants* transplanted are in some cases *Tithable*; for the case was, a man had a Nursery of young *Plants* in his ground, and used to transplant them, and to give or sell them to others, who planted them in their ground out of the Parish; the Parson of the Parish, where the Land lay in which they were first planted, libelled in the Ecclesiastical Court for the Tithes of the value of the said *Plants* transplanted, and a Prohibition was granted, and Declaration thereon given; and a Plea given in, and Replication, and thereon Demurrer; and it was argued by *Maynard* for the Defendant, and *Bolls* for the Plaintiff: The only point was whether Tithes should be paid in that case: it was Resolved per totam Curiam, that it ought to be paid; and thereupon a Constitution was granted (c). The Case had been otherwise Resolved, if the said *Plants* so transplanted from the said Nursery had been replanted in the same Parish (u).

Prescription, which refers to a certain person, House, Land, or other things as *Custum* doth to a County, City, Town, Hundred, &c. may be considered under two respects, either as *Declaratory*, or as *Prescriptive*: There is also in some Counties a *Decimatio*, or *Deceimatio*; a Tithing of things in their own nature not *Tithable*, as the Tithing of Tin and Sea Fish in Cornwall and Devon, Lead in Derbyshire, &c. but this is by *Custum*, not by *Prescription*; in which though in respect of place it regularly is a more extensive trade than properly *Custum* is, yet, in respect of persons and things, it regularly is under more Restrictions, limitations, than the other; but as to their Origin, they both ought to be continually constant without interruption; and as to their Antiquity both of them ought to be of a more Ancient Date, than any Memory of man can contradict and such being once duly acquired, there are not many interruptions and disturbances that will nullify either the one or the other. A *Prescription* goes to one man, and a *Custum* to many. *Hill v. Fisher*, 6 Car. 2. 133. *Bolls v. Mason*, *Bromley v. Parson*. *Prescription* is personal, and always made in the name of a certain person, or his Ancestors, or their whole Estates, &c. But a *Custum* is local, and alleged in no person, but that within the Manors there is such a *Custum*. *Ca. 4. Fisher & Cratchford's Case*. The payment of a Sum of money or other thing in lieu and recompence of Tithes for sixty years or thereabouts, is held a reasonable time to make a *Prescription* (w). It was Adjudged in *Griffin v. Jones*, 10 Mod. 130. that a *Prescription* to pay Tithes of one thing in recompence of Tithes of another thing, is not good. Adjudged also that Tithes shall be paid of Agistment of Cattel, against the Opinion of *Edward 4. & 5. 1. 1*. This *Prescription* is Real, that is, it respects not the Person, nor before Tithed Fruits, but the *Tithable*

(c) *Hill*, 174Car B.R. *Gibbs*ver. *Wyborne*.*Jones* Rep.(u) *Ibid*.(w) *Co. par. 1**Inst. 14. 2. par.*

653. 654.

(w) *Co. par. 1**Inst. 14. 2. par.*

653. 654.

(w) *Co. par. 1**Inst. 14. 2. par.*

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(w) *Co. par. 1**Inst. 14. 2. par.*

653. 654.

Tithable grounds that produce them; thence it is, that an alteration of Grain or Plants in the same Ground alters not a *Prescription*, but he that prescribes in the one, shall prescribe in the other also. Yet a *Prescription* extends to no more than is in possession. And therefore if the Parson of *A* prescribes to the Tithes of the Parish of *B*, and there happen to be *Decima vocalium*, that is, Tithes arising of such Grounds as were never manured, nor yielded before any profit to the Church, the Parson of *B* and not the Parson of *A* shall have them; nor will *Prescription* lye against a Composition between the Parson and the Vicar (*f*); nor hath *Prescription* any place, where the Interested (in his right) can make no demand, the matter ceasing, whereupon it should work. So of Wood never cut, the Tithes could never be demanded. Regularly a *Prescription* to pay no Tithes, nor any thing in lieu thereof, is not good, nor will it discharge, though nothing can be proved to have been paid within the memory of man (*e*). Yet a discharge of Land from Tithes, may be shewed another way, which will amount to the payment of no Tithes. So that although a meer Layman cannot prescribe to *non Decimando* (*e*); yet he may prescribe in *modo Decimando*, to pay a Composition to the Parson in lieu of all his Tithes; and such Composition shall bind the Parson, and such a *Prescription* shall be good (*f*). But as to persons Ecclesiastical, such may prescribe not only in *modo Decimando*, but also in *non Decimando*, and so may their Tenants; whence it is, that a Parson of one Parish having part of his Glebe in another, may prescribe in *non Decimando* for the same (*e*). So that a *Prescription* even *de non Decimando* as for Ecclesiastical persons, their Farmers and Tenants may be good (*d*). In *Nash and Adolins Case* it was agreed by the Court, that a Spiritual man may prescribe in *Non Decimando*. *Cap. par. 1.* And as for any other person a *Prescription de modo Decimando*, that is, to pay Money or other things in lieu of Tithes in kind, is good; and if he can prove it time out of mind, this will discharge him (*e*). Thus a *Prescription* to pay a *sum* or any other sum for all his Tithes whatever, or for all his Tithes Hay, or for all his Tithes Corn in such a Farm, or in such a Close, or for all his Fruit in such an Orchard, is good. But a *Prescription* of paying no Tithes Corn, because he pays Tithes Hay; or of paying no Tithes of his Cattle, because he pays Tithes Corn, is no good *Prescription* (*f*). Or of not paying of Tithes in one place, because he pays in another; or of not paying Tithes Lamb because he pays Tithes Wool, *vel e contra*, or of not paying Tithes for other Cattel, because he pays *in d. for* a Cow; these and the like are no good *Prescriptions* (*g*). Yet a *Prescription* to pay a less part than a Tenth, may be good and binding. Also a *Prescription* to pay a penny called *Heart-penny*, in satisfaction

(f) More.
Case 121.

(e) Dr. & St.
171, 167.
Bro. *Prescrip.*
92 Co. 244.

(a) Co. 2. par.
Bish. of Win-
chest. Case, &
in 8 Ed. 4. 14
by Croke.

(b) Adv. judg.
Mich.

(e) Roll. 1.
633. H. 3.

(d) More.
Case 498. &
693.

(c) Co. 1. 44.
45.

(f) Hill. 8 Jac.
R.R. Smith's
Case.

(g) 7 Jac. C. P.
in Fleetwood's
Case.

action of Tithes for all Combustible Wood, may be good. (b) More. Case 1280.
 Likewise, a Prescription by the Lord of a Manour, to pay six pound in satisfaction of all the Tithes Corn within the Manour, and to have the tenth Sheaf or Cock in recompence of his payment, is good. (c) But if the Prescription be to be discharged of Tithes Hay of such a ground, or Tith Corn of such a ground, and the Owner change the nature of the Ground, as Pasture into Tillage, or Tillage into Pasture, the Prescription is gone. (d) Yet a Prescription is not destroyed by an alteration of payment, as if in stead of the money to be paid, another sum, or Tithes in kind, have been paid for 20 years past. (e) But a Prescription to have Tythes of Houses according to the rent, is not good; for no Tithes are to be paid for Houses in any City, save in Lond. only. (f) Regularly Prescription refers to one in private, as Custom does to many in publick; & where a Prescription de modo Decimandi is denied, there a Prohibition will lie to try it at the common Law: otherwise, if the Prescription or Custom be agreed. (g) If a Prescription by a Parson, to pay the tenth part of Corn as a Modus Decimandi, the Hay also that grow on the headlands, it is not good; but such Prescription for the Corn and After-Rakings is good, with an averment, that they are *parce minus voluntarie*. (h) If there be a Prescription of a Modus Decimandi for an Orchard or Garden, and it afterwards ceases to be such, the Modus shall cease also, and Tithes shall be paid in kind; but if it afterwards be restored to a Garden or Orchard, by being replenished with Herbs or Fruit Trees, it shall pay the Modus as formerly. (i) If the Modus be to pay two shilling and the Shoulder of three Deer for a Park, the Modus remains, though the Park be disparked; it is otherwise, in case the Modus be only to pay Venison. (j) Or if the Prescription be to pay a certain Sum of money for all the Tithes of a Park, the Modus shall continue, though the Park be afterwards disparked. (k) A Prescription of a Modus Decimandi generally for a Park is not good, if it be Disparked; but it shall be particularly for all Aerca contained in the Park. (l) Prescription being a Temporal thing, is triable only in the Temporal Courts; & therefore in the Case of two persons of two several Parishes, where one of them claimed Tithes within the Parish of the other, and said, that all his Predecessors, Parsons of such a Church, viz. of D. had used to have the Tithes of such Lands within the Parish of S. and pleaded the same in the Spiritual Court; The Court was of Opinion, that in this Case a Prohibition did lie, for he claims only a portion of Tithes, and that by Prescription, and not merely as Parson, or by reason of the Parsonage, but by a Collateral cause, *scilicet* Prescription, which is a Temporal cause and thing. (r) And in another Case it hath been Adjudged, that if a Prescription

(b) More.
Case 1280.

(c) More.
Case 685.

(d) Hill. 7 Jac.
B. R. Shipman's
Case. Adjudg.

(e) Co. upon
Litt. 14.

(f) Dyer, 7.
(m) Hob. 11.

(n) Hob. 247.

(o) Mich. 2 Jac.
B. R. Rot. 346.

(p) Case Parry
vers. Channsey.
Noy. Rep. 15.

(q) Hil. 2 Jac.
B. R. C. Hooper
vers. Andrews.

(r) Rol. Rep. 15.
(s) Ibid.

(t) P. 13 Jac.
B. R. C. Mas-
chal & Price.

(u) Rol. Rep. 15.
(v) Co. vouch-
ed in one
Shibden's case.

(w) Noy. Rep.
Sharp vers.
Sharp.

(x) Vid. 37 H.
6 Bro. Prefe-
3 Mich. 29. E-
liz. B. B.

(y) Godb. 45.

(z) Vid. 37 H.
6 Bro. Prefe-
3 Mich. 29. E-
liz. B. B.

(aa) Godb. 45.

(ab) Godb. 45.

- be laid to pay a *Modus Decimandi* to 100 Acres, or to several things if there be a failure of one Acre, or of one thing, it is a failure of the whole Prescription. (u) But where it hath been Prescribed to pay in one part of the Land, the third part of the tenth; and in another part, the Molt of the tenth for all manner of Tithes, it hath been held a good Prescription. (v) These Prescriptions *de Modo Decimandi* are equally incident as well to Lay-persons as to persons Spiritual or Ecclesiastical; but as to Prescriptions *de non Decimando*, none but Spiritual persons are capable of being discharged of Tithes in that kind, as was Resolved in the Bishop of Winchester's Case. (w) Yet a whole Country or County may Prescribe *de non Decimando*, though this or that particular meer Lay-man cannot. (x) nor indeed can the other, unless there be sufficient Maintenance for the Clergy besides. (z) The Prescriptions *de modo Decimandi* are confirmed by Act of Parliament; (a) and if any Lay-man will Prescribe *de non Decimando*, to be absolutely discharged from the payment of Tithes, without paying any thing else in lieu thereof, he must found it in some Religious or Ecclesiastical person, and derive his Title to it by Act of Parliament; (b) and it is not sufficient to say, that they who Prescribe *de non Decimando*, are Church-wardens who have Land belonging to their Church, for they are neither Religious nor Spiritual persons: (c) But they who are such indeed, may so Prescribe not only for themselves, but also for their Tenants and Farmers, (d) as it was formerly said. So also may the Kings Patentees of those *Abbey-Lands* that came to the Crown by the Statute of 31 H. 8. Prescribe *de non Decimando*, by force of the said Statute, if so be it may be proved, that they have beyond the Memory of man so enjoyed the Lands discharged from the payment of Tithes, because he hath time out of mind repaired the Church, is no good Prescription: otherwise, in case he had repaired the Chancel, and in consideration thereof had been quit of Tithes; the Reason is, because the Parson not being obliged to repair the Church, hath no recompence. (e) And in *Shoberwood and Winchcombs Case* it was Resolved, that a man cannot Prescribe to have Tithes as parcel of a Mannor, for that they are Spiritual; but a Prescription to have *Decimam partem grandium*, is good: *Gr. Par. 1.* In a Case for a Prohibition, A. Labelled in the Ecclesiastical Court for Tithes of rough Hay growing in Marshes and Fenny-grounds in M. The Plaintiff Surmized, that there was 2000 Acres of Fenny-Lands within the Parish, and 600 Acres of Meadow, and that the Parishioners paid Tithes for Hay and Grain, growing upon the Meadow and Arable Land, and had paid a certain Rate for every Cow, and because they had not sufficient Grass to keep their Cattel
- (u) 15 Car. Sr. *Antb. Robinson's Case* vid Clayt Rep. 5. 135.
(v) Hill. 29. Eliz. B.R. *Rbo's Case* Godb. 120.
(x) Co. 2. Par. Bish. of Winchester's Case.
(y) Case ibid. & Dr. & Stu. 167.
(z) Dr. & Stu. ibid.
(a) St. 2 Ed. 6. c. 13.
(b) Seld. Hist. Decim. 409. Roll. 1. 651. H.
(c) Rol. ibid.
(d) Rol. ibid. H. 4. & Co. 2. 45. 2.
(e) Roll. 1. 649. d. 8, 9. vid. Law of Tithes, c. 16.

Cattel in Winter, they used to gather this Hay; called Fenny-Fodder, for the substance of their Beasts for the better increase of their Husbandry; and for this cause had been always freed from the payment of the Tithes thereof. It was Resolved, that the Surmise was not sufficient for a Prohibition; for one may not Prescribe *in non Decimando*, and their alledging, that they bestowed it on their Cattel, is not a cause of Discharge: A Consultation was awarded. *Webb. and Sir Hen. Warners Case, Cro. par. 1.* Also in *Munday and Levice's Case* in a Prohibition, it was Adjudged, that it was not a good *Prescription*, that Inhabitants have used to pay Calves and Lambs, and a peny for every Milch-Cow, in satisfaction of all Tithes of Lambs, Calves, Milch-kine, and all Barren and other Beasts, and Agistments. *More's Rep.* And where a Parson sued for Tithes of Fodder, and the Parishioners prescribed *in non Decimando*, because the Fodder was for their Cattel which manured their Land: It was held no good *Prescription*; but it was Agreed, Tithes should not be paid for their Agistments, nor for Hedge-wood to enclose the Corn, nor for Fuel. *More ibid. Case 892.* In the Case between *Pigott and Hearne*, the Lord of the Mannor of *B.* in the Parish of *D.* did Prescribe, That he and his Ancestors and all those whose Estates, &c. had used from time to time, whereof, &c. to pay to the Parson of *D.* the now Plaintiff, and his Predecessors 6 *l. per An.* for all manner of Tithes growing within the said Parish; and that by reason thereof, he and all those whose Estates, &c. Lords of the said Mannor, had used time whereof, &c. to have *Decimam Garbam & decimum Cumulum Garbarum* of all his Tenements within the said Mannor. It was in this Case Resolved, (1) That it was a good *Prescription*, and that a *Modus Decimandi* for the Lord by himself, and all the Tenants of his Mannor, for barring the Parson to demand Tithes in kind, is a good *Prescription*, because it might have a lawful Commencement. (2) It was Resolved, that it was a good *Prescription* to have *Decimam Garbam & decimum Cumulum Garbarum vel granorum*, or the tenth shooke; for he hath it as a Profit Apprender, and not as Tithes. (3) Resolved in this Case, That if the Queen be Lady of the Mannor, she may prescribe to have Tithes, for that she is capable of them, she being *Persona mixta & capax Spiritualis Jurisdictionis*. *More's Rep.* And in *Green and Handlyes Case* it was Resolved, (1) That it is a good Custom to pay the Tithe-Wool at *Lammas-day*, though it be due upon the Clipping. (2) That for the Pasturage of young Barren Cattel preserved for the Plough and Pail, no Tithe shall be paid. (3) That a *Prescription* to pay a peny called a *Hearth-peny*, in satisfaction of the Tithe of all combustible Wood, is a good *Prescription*. *More, Case 1213.*

Priviledge is derived from the Supream Authority upon good Consideration, and refers sometimes to Persons, sometimes to Places, and is an exemption from Tithes derived from such Supream Authority. None are to pay Tithes for Lands Priviledged or lawfully discharged from the payment thereof. *Stat. 2 Ed. 6. c. 13.* yet such *Priviledges* as are meerly Personal, do not exempt Lands from the payment of Tithes, longer than they are in the hands or occupation of Priviledged persons.

Q.

Quarries of Stone are not Tithable. Adjudged *Mich. 19 Eliz. B. R. & Pasch. 34 Eliz. C. B. Liff & Watts Case. Cro. par. 1. & More's Rep.* Nor do the Quarries of Slate, Cole, or the like pay any Tithe. *More. Case 1275.* Nor Quarries of Lime, Gravel, Sand, or Clay, for these are parcel of the Inheritance. *Regist. 55. F. N. B. 53. Bro. Dismes 18 Mich. 15 Car. B. R. Skinner's Case.* No Tithes shall be paid of Quarries, for they are parcel of the Freehold. *Hill. 11 Jac. B. R. per Curiam.*

R.

(f) Lev. 23.
22.

Rakings of the Stubble of Corn or Grain are not Tithable, for they are to be left for the Poor and Orphans, and the Law will not give to the Parson, or Vicar Tithe of that which is appointed for Alms. *Mich. 6 Jac. C. B. Smith's Case. & Pasch. 7 Jac. C. B. Adjudg. Cro. A. 660.* So that whereas it is said, that the Rakings of the Stubble of Corn is not Tithable, where the Corn it self was Tithed, *More. Case 433.* It may not be understood as if the Tithing the Corn it self were the reason why the Rakings are not Tithable, but because they are by the Law of Moses (of) due to the Poor, and therefore not to be Tithed; understand this also of ordinary Rakings, not voluntarily scattered, for of such only it is that no Tithes shall be paid, as not due by the Levitical Law, and for that they are but the scatterings of the Grain whereof he had paid Tithes before. *Pasch. 7 Jac. B. per Curiam. Hill. 8. Car. B. R. Saunders & Paramour, per Cur. Trin. 3 Jac. B. R. Pasch. 14 Jac. B. R. Pitts and Harris, Prohibition granted; otherwise it is, in case the Rakings were voluntarily and fraudulently scattered. Hill. 14 Jac. B. R. Peck and Harris per Cur. Adjudged. Mich. 3 Jac. B. R.*

x x x

R. per Popham. Pasch. 7 Jac. per Cur. Mich. 14 Jac. B.R. Foyse & Parker. And where there is a Prohibition of Tithes of *Rakings*, the Suggestion ought to be, that they were *Minus voluntaris sparsa*, otherwise it is not good; for it is not sufficient to say, that they were *Lapse & dissipata in Collectione*. And it was Resolved in *Johnson and Aubrey's Case*, that Tithes are not to be paid for After-pasture of Land, nor for *Rakings* of Corn. Also in *Green* and *Hunn's Case*, a Prohibition was for suing for the Tithes of *Rakings* of Barley, a Prescription to make the Barley into Cocks being alledged, and to pay the tenth Cock in satisfaction of all Tithes of Barley, and Adjudged a good Prescription. Notwithstanding in the Case between *Bird and Adams*, in a Prohibition to stay a Suit in the Ecclesiastical Court for Tithes of the *Rakings* of Lands after the Crop of Corn was taken away: It was held, that the Prohibition would not lie, but that Tithes should be paid of *Rakings*. *More's Rep.* But *vid. 42 Eliz. B.R. in Green and Hale's Case*, it was Adjudged, that by the Custom of the Realm Tithes should not be paid of *Rakings*. Also in *Green and Handley's Case* it was Resolved, that Tithes should not be paid of the *Rakings* of Corn, unless it be a Covinous *Raking* to deceive the Parson. *More. Case 1213.*

Rate-Tithe is that which is paid according to the Custom of the place, for the Feeding of Sheep and all other Cattel (except Labouring Oxen and young breed of Cattel) for the Pasture and Increase thereof, whether they feed on the Common or elsewhere.

Roots of Coppice-woods grubbed up, shall not pay Tithe, unless it be by Custom, as hath been Adjudged in *Skinner's Case*, *Mich. 15 Car. B. R. & Marsh. 58.* In which Case it was also Resolved, that if a man cut a Coppice-wood, and thereof pays the Tithes, and after before any new Sprouts grow, he grubs up the Roots and Stubs up the Wood, he shall not pay Tithes thereof, for they are parcel of the Free-hold (g).

(g) dist. Caf.
Bedford &
Dr. Skinner.
per Cur.

S

Saffron pays a Predial Tithe, and is *inter Minutas Decimas*, as appears by *Bedingfield and Feaks Case*. Pasch. 38 Eliz. B. R. Where the Farmer of a Parsonage sued in the Ecclesiastical Court for Tithes of *Saffron* against the Vicar: the Vicar pleaded that he and his Predecessors, time out of mind had had the Tithe of all *Saffron* growing within the Parish. The Plaintiff pleaded, that the Land where the *Saffron* was growing this year, had been for 40 years before sowed with Corn; and because they in the Ecclesiastical Court would not allow the Plea, a Prohibition was prayed, because the Right of the Tithe did come in debate. It was Adjudged, that a Consultation shall be awarded. Yet *Mich. 10 Jac. B. R. per Curiam*, they are said to be Great Tithes. *Vid. Bedingfield & Feaks Case. Cro. par. 1.* Whence it may be observed, that by the Ecclesiastical Law, the Vicar shall have Tithe of *Saffron* of Land newly sowed with *Saffron*, albeit the Parson before had Tithe of the same Land being sowed with Corn (a).

Salt: By Custom Tithe shall be paid of *White-Salt*. *Trin. 16 Jac. B. R. Case Jones & Gower*, Admit. But Prohibition granted on a *Modus*.

Sheep: If they continue in the Parish all the year, the Tithe thereof in kind may be claimed by Custom; but if they be sold before Shearing-time, and a Halfpeny be then claimed to be paid for every *Sheep* so sold, it is held a very unreasonable Custom (b). If *Sheep* stray out of one Parish into another, and there year, no Tithe is payable for this to the Parson of that place; but if they go there for thirty days or more, for this a *Rate-Tithe* is payable to that place; for, for *Sheep* removed from one Parish to another, each Parson must have Tithe *pro rata*: But under thirty days no *Rate-Tithe* is to be paid. Likewise *Sheep* feeding all the year in one Parish, and Coughing in another, the Tithe shall be equally divided betwixt the Parsons. So likewise if *Sheep* go awhile in one, and another while in another Parish, a *Rate-Tithe* is payable, as aforesaid, to both. But if *Sheep* are brought only by night to dung the Land, no Tithe there is to be paid, unless they Feed there half their time. And if *Sheep* be brought from one place to be shorn in another, where they were not before, the Tithe is payable where the shearing is, unless it be paid to the Parson of the place from whence they came. *Trin. 3 Car. B. R. in a Prohibition inter Ashton and Willer.*

And

(a) Mich. 31
Eliz. R.R.
*Bedingfield &
Feaks Case.*
Goldesb.
149, 150. &
More Rep.
Case 1209.
(b) Pasch. 17
Car. C.B.
*Weeden &
Harding's C.*
Vid. Mich. 2
Car. B. R.
Poph. Rep.
197. acc.
Marsh. 79.

And where several mens *Sheep* fed in one Flock under one Shepherd, they shall be severally Tithed by their respective Owners. *Lindw. c. Quoniam propter. verb. Lanæ.* A Prohibition was prayed, because the Parson Libelled in the Spiritual Court for the tenth part of a Bargain of *Sheep*, which had depastured in the Parish from *Michaelmas* to *Lady-day*: the party Surmised, that he would pay the tenth part of the Wool of them, according to the Custom of the Parish: The Court would not grant a Prohibition, for that, by this way, the Parson might be defrauded of all, and the *Sheep* being now gone to another Parish, he cannot have any Wool at this time, because it was not the time of Shearing (c).

(c) Mich.
2 Car. B. R.
Hob. 197.

Spoliation or the Action thereof, may be commenced in the Ecclesiastical Court, where one Parson takes away the Tithes or Profits belonging to the Church of another Parish, if the Tithes and Profits belonging to the Church of that other Parish, do not amount to the Fourth part of the value of the Church, in which case the one Parson shall have a *Spoliation* against the other in the Ecclesiastical Court, although they claim by sever Patrons; and if they claim both by one Patron, there the one shall have a *Spoliation* against the other, although the Profits do amount to above a Fourth part, as to a Third part, or to the Moiety of the Church, because the Patronage doth not come in debate. But if the Profits do amount to above the Fourth part of the Church, and they claim by several Patrons, that if one Parson sueth a *Spoliation* in the Ecclesiastical Court against the other, the party grieved shall have an *Indicavit*, which is in the nature of a Prohibition, unto the Ecclesiastical Court, because the Right of the Patron doth come into debate: But where the Right of Tithes doth only come into Debate, and not the Patronage, there the Jurisdiction doth belong unto the Ecclesiastical Court. *Co. Select Cases*, in the Case *de Modo Decimandi* 38, 39, 40, 46. 38 H. 6. 20. by Fortescue, 26 H. 8. 3. acc. And if there be a Contention *De jure Decimarum, Originem habens de jure Patronatus, tunc spectat ad Legem Civilem*, but the Opinion of all the Justices. *Mich. 29 El. B. R.* in *Bushie* the Vicar of *Paucas* Case. *Godbolt. 63.*

Sylva Cædua doth pay a Real and Predial Tithe; by *Sylva Cædua* is to be understood, all such Trees of what kind soever, as may be cut, and being cut do grow again from the Stock or Root. *Lind. c. Quanquam ex Solventibus, lib. 5.* Or all such Wood as may be cut, and (after Lopping, Topping, or cutting from the Boughs, Branches, Stock, or Root) do grow again; by which are excepted Great Trees and Timber Trees; So that of *Sylva Cædua* and Underwoods Tithes are payable; but not of the Great Trees, or of twenty years growth, and that by the Statute of 45. Ed. 3. cap. 3. Whereby

50 Ed. 3. 10.
b. 6. *Belknap.*

Vid. Co. 2. par. a Prohibition will lie, in case, &c. which Statute exempteth Wood
 Inst. 643, 644. of twenty years growth and upwards from the payment of Tithes,
 Selden: Hist. as Prescription doth such Wood as hath not been Felled in the Me-
 Decim. 236. mory of man; yet Wood of the age aforesaid, not in use nor apt
 Rol. 1. 637, for Timber, is (under permission of the said Statute) Tithable Bo-
 638, 639. dy and Bough, Felled or Lopped: And such Woods as are not *Sylva*
Cadua nor Tithable, go under the notion of Gross Woods, or
 Great Wood, viz. such as are usually employed for the Building
 (d) Co. 2. par. of Houses, Mills, &c. as hath been Resolved, (d) of which sort are
 Inst. 643. Oak, Ash, Elm, Beech, Horn-beam, and Asp: (e) Yet if these be cut
 (e) Plow. 470. under 21 years growth, they are accounted *Sylva Cadua*, and ought
 a. b. to pay Tithes. But the Loppings of great Oaks, Ashes, &c. though
 the Lops be under twenty years growth, shall not pay Tithes, be-
 (f) Co. ubi ing Priviledged by the Bodies; (f) nor are the Shoots and Under-
 supra. wood growing from the Roots and Stocks of such Timber-Trees
 (g) More. 762. Tithable, or from the Roots and Stocks of Trees above the growth
 Plow. 470. b. of 20 years, which have been felled. (g) Vid. Trees, Wood, Under-
 Rol. 1. 640. woods, and Timber.
 q. 1. 3, 4.

T.

T*Ares*, or Green *Tares*, cut before they are Ripe, or mowed
 when they are green, for the Feeding of Cattel, when Suit
 hath been commenced in the Ecclesiastical Court for Tithes thereof
 a Prohibition hath been granted upon a Suggestion grounded upon
 special Custom; that no Tithes ought to be paid for the same.
Fetches, *Tares*, and other coarse Grain, eaten only by the Cattel
 which do the Husbandry-work in the place, pay no Tithe, except
 there be a special Custom for it. *Lane* 16. Notwithstanding, whe-
 ther they are Tithable or not, if cut for Horses is a Question;
 for where upon a Libel in the Ecclesiastical Court for Tithes of
 Green *Tares* cut for feeding of Labouring Horses, it was moved for
 a Prohibition, it was not granted upon such a general Suggestion, it
 being no ground for it: Otherwise upon the Custom of the Parish,
 that no Tithe had been paid in such case. (a) It was *Mead* and
Thurman's Case, which is elsewhere Reported, that a Prohibition
 was prayed upon a Suggestion of this Custom that for *Tares* cut
 or mowed before they are ripe, and given to Plough-Cattel, Tithes
 ought not be paid: And another Custom for Headlands sown
 with Corn, used to be fed with Plough-Cattel, or mowed or cut
 for that purpose, that the Owners should be discharged of Tithes. It
 was holden by the Court, that this Suggestion grounded upon a
 Special

(a) Mich. 7.
 Car. B. R.
Mead verf.
Thurman.
Jones Rep.!

Special Custom was good: and the parties being sued for the Tithes of the premisses in the S. court, the court granted a Prohibition (b).

(b) Hill. 10 Car. B.R. Mead and Thurman's C. Gro. 1. pa. 285.

Timber-Trees, that have been usually Top'd and Lop'd such Toppings and Loppings are not Tithable; for the Law that doth privilege the Body of the Tree, doth privilege also the Branches thereof. The Law is the same, if the Tree becomes Rotten, Dry, and Barren. (c) *Timber-Trees* in all Counties, as Oak,

(c) Co. 11. pa. in Bowle's C. Co. 11. pa. 48. Liford's Case.

Ash, and Elm, after twenty years growth, are not (as aforesaid) Tithable. Also Beech, Horn-Beam, Maple, Asp, and Hazel, may in some Counties, where there is scarcity of other *Timber* and an

Usage accordingly, be computed as *Timber-Trees*, and not Tithable. But any *Timber-Wood*, if it be cut within 20 years after the first planting thereof, is Tithable. (d) But on the other hand *Timber-Trees* once discharged of Tithes are for ever discharged and quit of Tithes, though rotten & dead. Whether a Parson may

(d) More. Case 12; 1.

Prescribe to have Tithes of great Trees, contrary to the Common Law and the Statute of *Sylva Cadua*, *Quare*, 9 H. 6. 56. It is said by *Belknap*, (e) that of great Trees, or of *Timber-Trees*, Tithe was never demanded, and that by the Statute of 43 Ed. 3.

(e) 50 E. 3. 10.

But *vid. Coke* 11 par. in *Liford's Case*, the words in that Statute, and in the Book of 50 E. 3. viz. Great Trees must be intended, Oaks, Ash, and Elms, of all which as well before the said Statute

as since, if they were of twenty years growth, it seems by the Common Law Tithes were not to be paid, because of their own nature they were only accounted *Timber-Trees*, and fit for Building. But of Sallows, Willows, Maples, and the like, although they be above

twenty years growth, yet Tithes thereof shall be paid. (f) Of other Trees of the age of twenty years growth or up wards, which are *Timber-Trees*, Tithes shall not be paid; but of *Sylva Cadua* & Under-woods, Tithes shall be paid, but not of great Trees by Statute. (g) In a Prohibition the Question was, whether Trees which

(f) Plow. Com. 450. and Dr. & Stud. 169.

were above the age of 20 years growth become rotten, and be cut down for Fuel, shall pay Tithe or not. It was the Opinion of the Court, that they shall not pay Tithes, for that Tithes are payable for

(g) St. 45. Ed. 3 cap. 3: 11 H. 4. 39. 50 E. 3. 10.

all increase, and not for a decrease; and being privileged in regard of their high nature, this Privilege shall not be lost in regard of its decrease. (h) So if *Timber-Trees* become *Arida*, *Sicca*, &c. yet be-

(h) Hill. 43 El. C. B. Rame & Pateson's C. Goldsb. 145.

cause sometimes it was an Inheritance, which was discharged of Tithes, although it now become *Dotard*, Tithe shall not be paid of the same; for the quality remaineth, though the estate of the Tree

(i) Co. 11. pa. 81. Bowle's C. vid. Pas. 8 Jac. C.B. Dr. Newman's Case.

be altered. (i) If a Tree under the growth of 20 years be Top'd, and the Body thereof suffered to grow till it be past that age, and afterwards the Boughs being grown out again are Top'd, and Lop'd again, Tithes thereof shall not be paid, although

Godb. 175. ac. Hill. 2. Jac. B. R. Brock & Roger's Case. Gro. 1. par. 100.

that

(k) v. Brownl.
1. par. 33.
(l) 45 Ed. 3.
and the Book
50 Ed. 5.
(m) Plowd.
470.

Mich. 11. Jac.
B. R. Dolley
ver. Davis.
Bulstr. par. 2.

that the Tree was not Priviledg'd at the first cutting; which was the Opinion of the whole Court of Common-Pleas. (k) Such Timber-Trees are in Law known by the name of Great Trees, (l) and Grofs woods (m).

Trades and labours pay some Tithe by usage in the nature of Personal Tithes; and so Carpenters, Masons, &c. and all Handicraftsmen have paid Tithe. There was a Parson in *Bristol* that sued an Innkeeper there for the Tithes of the profits of his Kitchen, Stable, and Wine-cellar; in a Prohibition moved for by *Yelverton*, the Case appeared to be this: The Defendant being Parson of a Parish in *Bristol*, did Libel in the Ecclesiastical Court against the Plaintiff, being an Innkeeper of the *Bear* in *Bristol*, to have Tithes of the Profits by him made, of the Kitchen, Stable, and Wine-cellar, and says in his Libel there, that he made great gain selling of his Beer (having bought it for 500*l.* and sold the same for 1000*l.*) and so Libells for the third part of the Profits of the same, and sets forth in his Libel, that this is due unto him *per Communitatem Legem Angliæ*; and sets forth in his Libel, that *Negotiando* and *Traficando*, he doth bargain and sell Beer in his Inn for 1000*l.* which he bought for 500*l.* and gained in his Sale 300*l.* and better, of which gain he ought to have Tithe. *Yelverton* moved for a Prohibition, setting all this matter forth in his Suggestion; and further shewed, that the Defendant had yearly of the Plaintiff 40*l.* at the least. *Doderidge* Justice, the Defendant would have Tithe, as I think, also of the Kitchen-stuff. *Clench* Clerk of the Papers informed the Court, that there was a Parson, who Libelled for Tithes of the gains of 10*l.* for an 100*l.* put out at Interest, and a Prohibition was granted: in this principal Case, by the Rule of the Court a Prohibition was awarded.

Transaction differs from *Composition* only in this, that *Transaction* is an Agreement, touching Tithes, upon things litigious and doubtful; the other is Frank, gratuitous and voluntary, of things not contended for. See *Composition*.

Treble Damages may be had in an Action grounded upon the Statute of 2 Ed. 6. for not setting forth of Tithes; which Action is to be sued in the Temporal Courts.

Trees of all sorts regularly and generally (except Timber-Trees, as aforesaid) Root and Branch, Body, Bark, and Fruit, used or sold by the Owner, are Tithable. Tithes shall be paid of Hasel, Willows, Holley, Alder, and Maple, although above twenty years growth. Mich. 5. Jac. B. Resolved, and Consultation granted accordingly. So that *Trees* of all kinds, not apt for Timber, though exceeding 20 years growth, nor ever cut before, may be Tithable. And all *Trees* under the notion of *Sylva Cædua* aforesaid, underwoods,

Woods and Coppices felled and preserved to grow again are Tithable to the Parson, when the Owner takes his Nine parts. But Trees cut only for Mounds, Plow-Gear, Hedging, Fencing, Fewel, for maintenance of the Plough or Pail, be it Underwoods of Coppices, Parings of Fruit-trees, or the like, are not Tithable; but Trees bearing Fruit of all sorts, are Tithable in there Annual increase: And therefore as to Fruit-trees, as Apples, Pears, &c. the Tenth of the Fruit shall be set out and delivered, when they are newly gathered; for the omission whereof, if loss come to the Parson, the Owner is chargeable to him in the Treble Damages. If a man pay Tithes for the Fruit of Trees, and after cut down the same Trees, and make them into Billets and Faggots, and sell them, he shall not pay Tithes for the Billets and Faggots, for that it is not any new increase. *Coke, Magna Charta 652. 621. "If Trees be Fell'd, no Tithes shall be paid of the Roots. Coke, Pasch. 29 Eliz. B. R. nor of the young Sprouts, that grow of such ancient Stock. M. 12 Jac. B. R. Stampe & Clington. Roll. Rep.* And as Fruit-Trees pay Tithes in their Fruit, so also may young Trees, which as yet bear no Fruit, pay Tithes in another kind; for where a Parson Libelled in the Ecclesiastical Court for the Tithes of young Trees planted in a Nursery, upon purpose to be rooted up, and sold to be planted in other Parishes: The Question was, Whether Tithes should be paid for them? It was said, they were of the nature of the Land, and Tithes should not be paid of them, no more than of the Mines of Coles, or Stones digged; or for Trees spent in Fewel in the House. But it was the Opinion of the whole Court, That so far as he made a profit of such young Trees, Tithes thereof should be paid, when they are digged up, and sold into another Parish, as well as of Corn and Carrets, or other things of like nature (u).

(u) Will. 14
Car. B. R.
*Gibbs and Wilm-
born's Case.*
Cro. 1. par. 378.

Pasch. 29 El.
B. R. Crook
Rep. par. 1.

*Ramand Rat-
son's Case.*
Cro. par. 1.

Cro. par. 2.

Note by the Justices, If one cut Trees which are or may be Timber, although they be under the age of 20 years no Tithes are due; and so it is of new *Germins* growing under that age. And where in a Prohibition, for that it was Libelled in the Ecclesiastical Court for Tithes of Timber-Trees, the Defendant said, The Trees were long since *arida, mortua, & putrida*: It was the opinion of the Justices, That no Tithes should be paid of those Trees, for being above the growth of 20 years, they were discharged of Tithes. Also in *Brook and Roger's Case*, where a Parson sued in the Ecclesiastical Court for the Tithes of the Boughs of Trees, above the age of 20 years growth, and the Defendant prayed a Prohibition, and shewed that the Trees were *arida, sicca, & in culminibus putrida*; It was held by the better Opinion, that Tithes should not be paid of them.

The Lady *Walterhouse* and *Bawde's Case*. Cro. par. 1.

In an Action upon the Case: Declared, whereas by the Statutes of 45 *Ed. 3. cap. 3.* Tithes ought not to be paid for Gross Trees: That she had cut down such Timber-Trees, being above the growth of twenty years, and that the Defendant as Parson sued her for Tithes of them against the Statute; upon which it was demurred. Resolved by the whole Court, That the Action did not lie; for none shall be punished for suing in the Ecclesiastical Court for any matter which is properly demandable there, although perhaps he hath no cause of Action: But if he sues in the Ecclesiastical Court for matter, which appears by his Libel is not suable there, nor the Court hath Jurisdiction thereof; there an Action upon the Case lieth.

Turkeys: Tithes shall not be paid of them, nor their Eggs,

(o) *Houghton* *quia Ferae naturæ* (o).

and *Prince's Case*. Mor. Rep.

Turves used for Fuel or Firing, do pay Tithe, and are Tithable as Predial Tithes; yet held that Tithes shall not be paid thereof, *Hill. 14 Jac. B.R. per Houghton. Hill. 11 Jac. B.R. per Cur.*

Tile-Stones or *Brick-Tile* are not Tithable (*).

(*) Adj. Mich. 19 Eliz. B. R. & Pasch. 34 Eliz. C. B. *Liff and Wat's Case*.

Tythes or *Tithes* are a Tenth, or otherwise a certain part or portion of the Fruit or lawful Increase of the Earth, Beasts, or Mens Labour and Industry; and are payable by every person having things Tithable, that cannot shew a special Exemption, either by Composition, Custom, Prescription, Priviledge, or some Act of Parliament; And they are to be paid without any Diminution; for which reason the Owners of things Tithable ought not to have the Nine parts, till the Tenth be first severed therefrom. And on the other side, the Tithe is in no case to be taken by the Parson or Vicar, before the same be severed from the Nine parts. The Parson *de jure* is to have all the Tithes, if there be no Endowment of the Vicarage (p); and a Vicar cannot have Tithes, but by Gift, Composition, or Prescription, for that all Tithes *de jure* do belong to the Parson (q). In Suit for Tithes it is not necessary to demand the very value, for the Duty is uncertain. *Mich. 16 Jac. B.R. Case Pemberton and Shelton, Roll. Rep.* If Tithes be payable by one who dies before he pay it, it must be paid by his Executor, if he hath *Assets*. But if the Parithioner setteth forth his Tithes, and they stand upon the Land two or three days, and afterwards he taketh or carrieth them away; this is not a setting forth of his Tithes within the Statute of 2 *Ed. 6. (r)*. But if the Parson or Vicar shall suffer his Tithes (being severed) to lie long upon the Land to the prejudice of the Owner of the Ground, he may have his Action of the Case (s). And whoever taketh away the Tithes, not having right thereto, is a Trespasser. Also an Action lieth against a Disseisor for the Tithes: or if one cut them; and another carrieth them

(p) 20 Eliz. B. R. in *Bushie* the Vicar of *Pancas Case*. Godb. 63. (q) Pasch. 15 Car. B. R. *Marsh. 11.*

(r) Adj. 10 Car. in *Anderson's Case*.

(s) Ley. 70.

them away, an Action lieth against either of them (t). And although in the Ecclesiastical Courts no Plea is allowed in Discharge of Tithes (u); yet Lands in the hands of Ecclesiastical persons may be discharged of Tithes, and now since the Statute of 31 H. 8. in the hands of the Kings Patentees also, by Suspension, Privilege, or Unity (w). And since in the Ecclesiastical Courts no Plea (as aforesaid) is allowed in Discharge, it is nothing strange that the Common Law holds, that the Court Spiritual hath not Jurisdiction in matter of Tithes, where the Prescription is *de non Decimando*; otherwise, where it is *de modo Decimandi* (x). The manner of right Tithing, is regularly thus, viz. That Tithes and all other Church-Duties, shall be yielded and paid according to the Usage and Custom of the place, where they are paid: And of Predial Tithes, the Tenth is to be set apart from the Nine parts in the place where they grow, before the said Nine parts are carried away; which Separation from the Nine parts is to be done in presence of the Parson's Servant, upon seasonable Notice given to the Parson by the Parishioner; and the Parson is to have reasonable time to take away his Tithe (z). And as for the *Small Tithes*, such as Plants, Herbs, Seed of Woad, Flax, Hemp, &c. they are Tithable in kind, if not Compounded for. And *Personal Tithes*, such as are for Profit made by Trade and Manual Occupations (except Common Labourers) are to be paid, as they were used to be paid forty years before the Statute of 2 Ed. 6. and as of right they ought to be paid, as at or before *Easter* some small Sum of Mony, according to the Custom of the place; but without a Custom nothing to be paid (a). The Tithes of one thing only cannot be in satisfaction of Tithes of the same, and other things of another kind (b). Nor is Tithe twice payable of one thing in one and the same year; Therefore if a Parson hath Tithe-Fruit of a Tree felled the same year, and made into Billets or Faggots, he shall not have Tithe thereof. Nor are Tithes payable by any, but such as have a Property in the thing Tithed, therefore they are not payable of things Stollen; nor shall things meerly for Pleasure pay Tithes, nor the things that are in no mans property; only the King shall have the Tithes arising out of Ground not in any Parish. And if Tithe be paid to one that comes into the place by Simony, it is at his own peril, if afterwards he be forced to pay it again (c). Where Sale is or may be made of a thing Tithable, the equallest way is to let the Parson or Vicar have the Tenth Penny made of the thing sold; And although Tithe is not payable to the *Simonaick* Parson, yet an Incumbent wrongfully Collated by the Bishop, may be such a person as is capable of Tithes, and may Sue for the same (d).

(t) Pasch. 15
Car.B.R. upon
Stat. 2 Ed. 6.

(u) Dr. & Stu.
127. & in 8 Ed.
4. i. 4.

(w) Vld. Hugh.
Parsons Law,
cap. 27. p. 235.

(x) Yelv. 79. 2.

(z) Broo. Tripl.
125. Co. 2. par.
Inst. 610.

(a) By 3 Judge.
17 Jac. B.R.
(b) More.
Case 623.

(c) Hob. 168.

(d) Hob. 302.

- In *Love and Pigot's Case* it was said, That if a Lessee for years be Sued in the Spiritual Court for Tithes, he in the Reversion may have a Prohibition. *Paſeb. 29 El. B. R. Cro. Rep. par. 1.* And a Lay-man lawfully Interested in Tithes, being disseised thereof, or wronged therein, may have his Remedy for them in the King's Temporal Courts. This takes not away the ordinary Remedy for them in the Ecclesiastical Court; the Law (as to that) being as it was before the Statutes (e). Likewise, for refusal to pay Tithes, or not setting forth Predial Tithes, the Parson may Libel in the Ecclesiastical Court, or he or other Proprietor thereof may Sue at the Common Law, or for the Subtraction thereof, at their Election, and recover the Treble value of the Tithes (f). Yet where only the Right of Tithes doth come in debate, and not the Right of Patronage, in such case it hath been held, That the Ecclesiastical, not the Temporal Jurisdiction, shall take cognizance thereof; yea, though both parties claim by Prescription, which in it self is a matter Triable at the Common Law (g). But where the parties Litigant are both Ecclesiastical persons, and the Claim of the one be for an Annual Pension out of the Parsonage of the other, although he claim the same by Temporal grounds, viz. by Prescription and Real Composition, he hath his Election to sue for the same either in the Ecclesiastical, or in the Temporal Court: And by the Statute of 34 H. 8. c. 16. Ecclesiastical persons may sue for Pensions in the Ecclesiastical Court; but if he brings a Writ of Annuity for the same, and declares upon the Prescription, he hath then determined his Election, that if afterwards he sue for his Annuity in the Ecclesiastical Court, a Prohibition will lie (h). If Suit be in the Ecclesiastical Court betwixt Parson and Vicar for Tithes, Prohibition hath always been denied, if there be not other matter determinable by the Common Law. *Mich. 16 Jac. B. R. Roll. Rep.* But where the Question is only betwixt the Parson and the Vicar, it is to be decided in the Ecclesiastical Court (i). Yet it is said, That a Real Contract, though made between Ecclesiastical persons and of Ecclesiastical things, is only cognizable at the Common-Law (k). But if a Custom of Tithing be agreed by and between both parties, it may be sued for in the Spiritual Court; but if the Custom be denied, a Prohibition may be awarded, till it be tried at Common-Law (l). But where there is a *Modus Decimandi*, be it of Lands, or a certain Annual Sum of Money, or other profit time out of mind given to the Parson and his Successors, in full discharge of all Tithes in kind, in such a place certain; if this Sum be not paid, yet may not the Parson sue for Tithe in kind, but for the Money in the Ecclesiastical Court; But yet the *Modus* it self is Triable at the Common Law, and not in the Spiritual Court (m). Likewise after that
- (e) Dyer 133. Co. 11. 13.
- (f) Adjudg. 29 El. *Wood's Case*. St. 2 Ed. 6. Vid. Co. 2. par. Inf. 650. b. Hil. 40. El. C. B. Rot. 699. *Bedell's Case* acc. (g) 22 Ed. 4. 24. Mich. 29 El. B. R. Adjudg. acc. 35 H. 6. 39. acc.
- (h) *Hugh, Parsons Law*, c. 27. P. 292.
- (i) Mor. 1267.
- (k) Marth. 87.
- (l) Hob. 247.
- (m) Co. Select Cases 40. 46.

that the Tithes are carried away out of the Ground, it hath been held, Suig cannot then be commenced for them in the Ecclesiastical Court, because they are then become Lay-Chattels, and the Property thereof is altered (n). And for the not setting forth of Tithes, not only the Parson or Rector, but also the Farmer of the Rectory may sue upon the Statute (o). The bare severing or setting forth of Tithes, doth not make them to become Lay-Chattels, but the carrying them away out of the Ground doth; And therefore if Tithes be severed, and set forth, and afterwards the Parson lease out the Parsonage, not mentioning the Tithes, the Tithes set forth shall pass; for although they be divided and severed, yet they are as yet spiritual Duties of the Parsonage: But if the Tithes be carried into the Barn, and afterwards the Parson leaseth out his Parsonage, with all Profits, &c. those Tithes shall not pass to the Lessee, for that now they are become Lay-Chattels (p). It was agreed clearly in *Conner's Case*, That if a Parishioner sever his Hay, and it be made into Bales or Cocks, and after sell it, the Parson cannot sue the Vendee for the Tithes thereof, but him that severed it, and on this matter Prohibition was granted, *H. 16 Jac. B.R. Roll. Rep.* If a Parishioner doth not set forth his Tithes, or substracteth them after they be once set forth, the Parson may Libel against him in the Spiritual Court; or else by the Statute of 2 Ed. 6. cap. 13. the Parson or other Proprietor of the Tithes may have their Action in the King's Temporal Courts, for the not setting forth, or substracting of them at their Election, and shall recover the Treble value of the Tithes in an Action of Debt: for although the Treble value be not given to the Parson, or other Proprietor of the Tithes, by any express words of the Statute; yet, inasmuch as he is the party grieved, and hath the Right of the Tithes in him, the Treble value is given to him. For wherefore, a Statute giveth a Forfeiture or penalty against any one, who wrongfully detaineth or dispossesteth another of his Right or Interest; in that Case he that hath the wrong, shall have the forfeiture or penalty, and shall have his Action at the Common Law for the same, or he may sue in the Ecclesiastical Court for the same (q). But in his Action at Common Law it seems, he shall recover no Costs, as hath been Adjudged (r). But if the Parson or other Proprietor will sue in the Ecclesiastical Court for the subtraction of the Tithes, he shall recover there but the double value of them; because in that Court he shall recover the Tithes themselves, which is equivalent to the Treble value at the Common Law (s). In another Case, where Debt upon the Statute of 2 Ed. 6. was brought, for not setting forth of Tithes; the Plaintiff shewed, That Two parts of the Tithes did appertain to the Rectory, and a Third part to the Vicarage, and that

(n) Tr. 12 Jac.
B.R. *Cafe Reynolds & Hayis.*
Rol. Rep. vid.
38 Ed. 3. 13.
by *Finchden*.
Co. 11. par. Dr.
Grant's Case.
(o) More.
Cafe 192.

(p) Mic. 6. Jac.
C. B. *Smith's*
Cafe Adjudg.

(q) Mic. 29 El.
Wood's Cafe
Adjug. Co. 2.
par. Inst. 650.
(r) 43 El. C. B.
St. Moyl Finch's
Cafe, & vid.
Hil 40 El. B.R.
Rot. 699. Pr-
dell's Cafe acc.
(s) Co. 2. par.
Inst. 651. 2.

that he had a Lease for years of the Rectory, and another Lease of the Vicarage: And for not setting forth of the Tithes he demanded the Treble value: upon *Non Debet*, it being found for the Plaintiff, it was urged in stay of Judgment, that he ought to have brought several Actions, being grounded upon several Leases, as his Title is several. But it was Resolved, That the Action was well brought, in regard he had both Titles in him; and the Action is brought upon the wrong, because he did not set out the Tithes (r). Again, in Debt for not setting forth of Tithes upon the Statute of 2 Ed. 6. The Case was, Corn was growing upon the Glebe-Lands of the Vicar, which was discharged of Tithes being in his own use; It happened that the Vicar died before the Tithe was severed, and his Executors did cut and carry away the Corn; and he that had the Parsonage appropriate brought the Action; The Counsel of the Defendant prayed the Opinion of the Court, whether he might plead *Nil debet*: But the Court refused to deliver their Opinion in it, because it hanged in Suit before them (u). In the Case of *Mountford* against *Sidley* it was said, That where Tithes are set out, the Parson hath a liberty for a convenient time to come and carry them away: And this convenience of Time is triable by a Jury; if he exceed this, he shall be subject to an Action, and then by Judgment of Law he shall be taken to be a Trespasser *ab initio*: Otherwise, it shall be of a License in Fact given to the Parson himself. And it was holden by the Court, if the Corn had continued over long, his Remedy had been by Action upon the Case (w). And as a Parson ought to have a convenient time to carry away his Tithes, so likewise he ought to have for that end free ingress, egress, and regress, to, through, and from the Land where the Tithes are, wherein if he meet with any obstruction, he ought to see how he Sues and takes his Action; for in a Case, where a Parson Libelled for Tithes in the Ecclesiastical Court, and set forth, That the Tithes were set forth, and that the Defendant did hinder him and stop him from carrying them away: but because he did not Sue there upon the Statute of 2 Ed. 6. for he did not mention the Double value as he ought, and it was agreed by all the Justices, he ought to have done; nor mention the Statute, as he ought also to have done; a Prohibition in that Case was awarded (x). The Grant of a Tithe for life to begin at a day to come, is not good. *Relvert. 131*. If a man will let a Lease of his Tithes, the Lease must be by Deed, and not by word only; therefore, if a Parson doth Demise his Rectory for years, the Tithes will pass *inclusive*, although the Lease be by word only; but if the Parson Lease his Tithes alone, they will not pass, unless the same be by Deed or Writing (y). Yet the Parson may Demise his Tithes to the owner of the Land, for a year by

(r) Hil. 2 Jac.
B. R. Sr. Rich.
Champernon &
Hill's Case.
Cro. 2. par. 68.

(u) Tr. 15 Jac.
B. R. Horn and
Cotton's Case
Hob. 387.

(w) Hil. 22 Jac.
B. R. Rol. 212.
Mountford and
Staylie's Case.
Bulstr. 3. par.
336, 337. vid.
Trin. 21 Jac.
B. R. Wiseman
& Denham's C.
Godb. 329.

(x) P. 17 Car.
C. B. Adj. acc.
Hugh. Abr.
Dimes, Sect. 4.
S. 7.

(y) Tr. 26 El.
B. R. Withy and
Paunder's Case.
Adj. acc.

by word only, as hath been agreed by all the Justices (x); but to a Stranger he cannot Demise them, otherwise than by Deed; And although Tithes will (as aforesaid) pass by Contract to the Owner of the Soil; yet may the Parson sue the Owner for Tithes in kind in the Spiritual Court, and (as it hath been holden) the Owner by reason of the Contract, shall not have a Prohibition (a). In which case the owner of the Soil may sue the Parson upon the Contract in the Temporal Court, and recover as much in Damages; but then in his Pleading he must not declare of a Verbal Contract, but must set forth the same to have been made in Writing, and so it hath been Adjudged (b). And in the Lord *Shandois* Case it was holden by the Court, That a Suggestion of an Agreement between him and the Parson, in consideration of a certain Sum to be yearly paid to the Parson, during their Joint-Lives, and his continuing Parson, that his Messuage and Lands in the Parish of *D* and the Tenants thereof, should be discharged from the payment of Tithes thereof, shewing that the said yearly Sum was paid accordingly, and that notwithstanding the Defendant sued the Plaintiff, being his Farmer, for Tithes: In this Case it was held, That this was not a sufficient Surrender to maintain a Prohibition; For an Agreement to be discharged from Tithes, may be a year by word; but to have such an Agreement for life or years, cannot be without Deed (c). Likewise in an *Ejectione Firmæ* brought of a Lease of Tithes, the Plaintiff did not shew, that the Lease was by Deed; and because Tithes cannot pass without Deed, after a Verdict found for the Plaintiff; It was ruled to be ill, and adjudged for the Defendant (d). To conclude, In the 19 *El. B.R.* it was debated, Whether Tithes were *Jure Divino*, or by the Constitution of men only? The Judges were all it seems of Opinion, That they were due as well by Constitution of Kings as by the Law of God (e). And therewith doth *Dr. & Stu.* agree, 166. if the Question be *de Quota parte*: For there it is held, that the 60 part is due only by mans Law. And the opinion of *Gerson* the Divine, is cited in his Treatise, Entitled *Regule Morales*, where it is said, *Solutio Decimarum Sacerdotibus est jure Divino, quatenus inde sustententur; sed quoad hanc quam illam partem assignare, aut in alios redditus commutare, Positivi juris est.* And elsewhere, *Non vocatur portio Curatis Decima pars, imo est interdum vicesima, aut tricesima (f).* And in *Hensloe's* Case, Co. 9. part. it is said, That Tithes, Quatenus Tithes, were Spiritual things, and due *ex jure Divino*, and were not accounted as Temporal Inheritances (g). Hence it is, That where a Parson leased all his Glebe-Lands, with all Profits and Commodities, rendering 13 s. 4 d. *pro omnibus exactionibus & demandis*; and afterwards Libelled in the Spiritual Court against his Lessees for the Tithes thereof. It was the Opinion of the Court, That

(x) M. 2 Car.
B.R. *Bellamy &*
Babthorp's Case
Rot. 175.
Codb. 373.

(a) Mich. 8 Jac.
C. B. in *Croft's*
Case.

(b) Mic. 7 Jac.
C. B. in *Paw-*
ling's Case.

(c) M. 4 Car.
B.R. in *Hawes*
& *Brayfield's*
Case, Cro. 2.
par. 137. vid.
Nelson & Pro-
temian's Case, &
Rolls & Roll's
Case. B.R. Ad-
judg. acc. ibid.
(d) P. 10 Jac.
B.R. *Botte* and
Crompton's Caf.
Cro. 2. pa. 613.
(e) 19 El. B.R.

(f) Dr. & Stu.
166. & 19 El.
Dyer in B. R.
Adjud. vid.
Hugh. Abr.
Dignis Sect. 1.
§. 11, 12.
(g) *Hensloe's*
Case, Co. 2. par.

That Tithes are not things issuing out of Lands, nor any Rent or duty, but Spiritual; and if the Parson doth Release to his Parishioners, all Demands in his Lands, his Tithes thereby are not extinct; and therefore a Consultation was granted (b). And in the like case it hath been Adjudged, That the Lessee should pay Tithes to the Parson, for that they are *jure Divino* due, and cannot be included in Rent (b).

(b) Tr. 31 E.
B.R. Style and
Miller's Case.
Leon. 300.
(i) 32 Eliz.
in Babington's
Case.

If a Parishioner sets forth his Tithes, and lever the Tenth part from the Nine parts justly and truly, although he doth not give personal notice to the Parson, nor general notice in the Church of the time of setting forth his Tithes, whereby the Parson might be present at the setting of them forth, and to see that it be justly done; yet is it a good setting forth of the Tithes, as in the Case between *Chace and Ware*, in a Writ of Error upon a Judgment in an Action upon the Case, against the Parson, for leaving his Tithe of Hay upon the Parishioners ground after notice of setting them forth, whereby the Parishioner lost his Grass there. But it was not alledged, that the Parson had notice of the time of setting them forth; and yet the Court affirmed the Judgment against the Parson.

Mich. 33 Car.
B.R. Chace and
Ware. per Cur.
Intratur Trin.
13 Car. Rot.
564.

A Parson in Consideration of 20 s. yearly, promised to B. that B. should pay no Tithe for a certain Wood, *per parol*; and in Consideration thereof, B. promised to pay the 20 s. yearly, and this Agreement was during their Lives. B. made a Lease at Will of the Wood; the Lessee had a Prohibition against him, for the Agreement was good; and *Fermyn* demanded, what Remedy against the Lessee for the 20 s. *Doderidge*, None; but he shall have an Action on the Case against B. or his Executors; but the Lessee for years may have an Action against the Parson, if he Sue him in the Ecclesiastical Court. For the Case was, There was an agreement *per parol* made between S. Parson, and B. the Parishioner: B. promised to S. for himself, his Executors and Assigns, to pay him Ten Load of Wood, and 10 s. for the Tithe of a Wood, during the life of S. And S. promised not to sue him, &c. for any other Tithe. B. dies, his Executor made a Lease at Will of the Wood; the Question is, Whether the Tenant at Will, may take his Action against the Parson who sued him for other Tithes, &c.

Trin. 21 Jac.
B.R. Bennet
vers. Still.
Rol. Rep.
par. 2.

Savile woods
Case. Cro.
par. 1.

In a Prohibition against a Parson who sued for Tithes, it was Surmised, That the Clerk of the Parish and his Predecessors, Assistants to the Minister, had used to have five shillings for the Tithe of the Lands, where, &c. It was the Opinion of the Court, That if this Special matter be shewed in the Surmise, it might perhaps be good by reason of long continuance; but they held that by Common indentment, Tithes are not payable to a Parish-Clerk, and he is no party in whom a prescription can be alledged, wherefore a Consultation was awarded.

The

The Parson of *T.* sued for Tithes-Wood of the Park of *T.* for a Prohibition it was surmized, That he and all those, &c. time out of mind, &c. had used to pay to the Vicar of *T.* ten shillings yearly for all Tithes of Wood growing in the place, and the proof was, That he paid ten shillings for discharge of Tithes-Wood in the Park and two other places: the Prohibition was denied, and a Consultation awarded, because the right of Tithes between the Parson and the Vicar came in question, and because the party failed in the proof of his Prescription.

Sherburn's
Case.
Cro. par. 1.

In a Prohibition to stay Suit for Tithes, surmizing that he set forth his Tithes, and for some reasonable cause he detained part of them: And the Parson sued them in the Ecclesiastical Court; upon which it was demurred; because by the setting forth they were Lay-Chattels. But the Court held, That the Prohibition did not lie; for against the party himself, who setteth forth his Tithes, a Suit is maintainable in the Ecclesiastical Court, if he detains them, although he might have his Remedy for them at the Common Law: Otherwise, if they were taken away by a Stranger after they were set forth.

Litch and
Wood's Case.
Cro. par. 1.

For a Prohibition it was surmized, That he had used to pay the Tenth sheaf of Corn, the Tenth Cock of Hay, the Tenth Fleece of Wool (and so the like) in satisfaction of all Hay, Corn, Cattel, &c. And it was held, that it was no sufficient Surmize for a Prohibition, because that which he used to pay is but the Tenth in kind.

Ingalsby and
Johnson's Case.
Cro. par. 1.

In *Sands and Pruries Case* the question was, Whether Tithes were grantable by Copy: It was Objected they could not, because it is against the nature of Tithes, whereof none could have Property before the Council of *Lateran*, and it was impossible there should be any Custom to demise them by Copy, when none had interest in them, and they cannot be parcel of a Mannor, for they are of several natures, though united in one mans hands. But by the Court Resolved, they might be granted by Copy, so it had been time out of mind.

Cro. Ibid.

A Parishioner severed his *Tythes*, but being in a Close, the Gate was locked, so as the Parson could not come at them: The question was, Whether the Gate were locked or open, and thereupon a Prohibition brought; The Court was of Opinion, that although the Tithes were severed, yet they are Suable in the Ecclesiastical Court, and then the other is but a consequent thereof, and Triable there, and the Prohibition denied.

Blackell's Case.
Cro. par. 1.

In *Sharlington and Fleetwood's Case* it was Resolved, That if a Parson Libels for Tithes, and a Prohibition is granted, and after he Libelleth for the Tithes of another year, the first Suit not being

Morris's Rep.

Moor's Rep.

determined, an Attachment upon the Prohibition lieth against him. And in the Case between *Talentire* and *Denton*, where the Bishop of *Carlisle* being seized in fee of *Tithe*, in right of his Bishoprick, made a Lease of them for Three Lives, rendring the ancient Rent, the *Tithes* having been usually demised for the same Rent; It was Resolved, That the Lease was not good against his Successor, because he had not remedy for the Rent by Distress or Action of Debt: Otherwise it had been, if only a Lease for years, for there Debt lieth for the Rent.

Ibid. Case.
1219.

In *Leigh* and *Wood's* Case it was Resolved, That if the Owner set forth his *Tithe*, and a Stranger takes them, no Suit shall be for the same in the Ecclesiastical Court; but if the Owner himself, after he hath once set forth his *Tithes*, takes them away again, the Parson may sue him in the Ecclesiastical Court for the *Tithes*.

Trin. 44 El.
B. R. Spratt
against Hiall.
Co. lib. 13.

S. Libelled in the Ecclesiastical Court against *H.* for Subtraction of *Tithes*; the Defendant there pleaded, That he had divided the *Tithes* from the Nine parts. And then the Plaintiff made Addition to the Libel (in nature of a Replication) viz. That the Defendant divided the *Tithes* from the Nine parts, *Quod prædict.* the Plaintiff *non fatetur, sed prorsus diffitetur*; yet presently after the pretended Division, *in fraudem Legis*, he took and carried away the same *Tithes*, and converted them to his own use; and thereupon the Plaintiff obtained Sentence in the Ecclesiastical Court, and to recover the Treble value according to the Statute of 2 Ed. 6. cap. 13. And thereupon *H.* made a Surmize, that he had divided his *Tithes*, and that the Plaintiff ought to Sue in the Ecclesiastical Court for the Double value, and at the Common Law for the Treble value. But it was Resolved by the whole Court, That the said Division mentioned in the Libel, was not any division within the Statute of 2 Ed. 6. c. 13. For that Act provides, That all the King's Subjects henceforth, shall truly and justly without Fraud, divide, set out, yield and pay all manner of other Predial *Tithes* in their proper Land: So as when he divides them to carry them away, he divides them not justly without fraud; and therefore the same is out of the Statute; and where the words of the Statute [*divide, set out, &c.*] their Predial *Tithes, &c.* and if any Person carry away his Corn and Hay, and other Predial *Tithes, &c.* And to make an evasion out of these words [*this Invention was devised*]; the Owner of the Corn by Covin sold his Corn, before Severance, to another, who as Servant to the Vendee reaped it, and carried it away without any Severance, pretending that neither the Vendor, because he did not carry them away; nor the Vendee, because he had no property in them, should be within the Statute. But it was Resolved, That the Vendor should be charged in that case with the penalty

nalty of the Statute, for he carried them away, and his fraud or covin shall not help him. *Vid.* 8 *Ed.* 3. 290. 9 *H.6.* 41. 33 *H.6.* 5. But it was resolved, That the Plaintiff could not Sue in the Ecclesiastical Court for the Treble value, but for the Double value he might.

A Parson Libels in the Ecclesiastical Court upon the Statute of 2 *Ed.6.* cap. 13. for Tithes. The Case was this, The Parson sets them out according to the Statute; but they being so set out, he would not suffer the Parson to come and take them away, thinking by this means, and this way to avoid the Statute; And upon this the Parson Libels in the Ecclesiastical Court for these Tithes; the Defendant there Surmizes, That he did not hinder him from the having of his Tithes, but saith, That he did hinder him in coming for his Tithes one way (which was the usual way) but that he might have come for them another way; And upon this a Prohibition was prayed, and granted, supposing that there was no question at all as touching the payment of Tithes, but as touching the Way to come for them; and upon this whole matter the Parson prayed a Consultation, *The whole Court were clear of Opinion*, That such a setting out of Tithes, as the same appeared here to be in this Case, without suffering the Parson to come and take away his Tithes, that this is a fraudulent and no good and sufficient setting forth of Tithes, according to the Statute, and as the Statute doth require, which ought to be a fruitful and effectual setting forth of his Tithes; for in so doing, he ought to set forth his Tithes, and also to suffer the Parson to come, have, and to take away his Tithes, otherwise, unless he do also perform this, the setting out of his Tithes here is to no purpose for to excuse him. And to the Surmise here made for the Way, *The whole Court were of Opinion*, That this is no way at all material, and so without any further motion or Arguments, by the Rule of the Court, a Consultation was granted. *Vid. Bulfr. par. 1. fol. 108. Hill. 8 Jac.*

where upon a
Libel for Tithes,
a Prohibition;
and where a
Consultation
shall be grant-
ed.

A Consultation
granted.

V.

Venison, though not Tithable of it self, yet it may be given as *Modus Decimandi*; *Per Affisas Forestæ*, and other Records; it doth appear that *Tithes* have been paid, even of *Venison*, in divers parts of *England*.

Ketches, *Tares*, and the like, eaten by the Cattel that do the Husbandry in the same Parish, be they eaten on the Ground or elsewhere, are not Tithable, unless the Parson hath a Special Custom for it.

Vine is Predial Tithes. *Co. Magna Charta*, 649.

Unity of Possession, or *Unity* of the Parsonage and Lands, which should pay *Tithes*, in the hands of Religious and Ecclesiastical Persons: By this *Unity* of Possession *Tithes* are not now discharged in Right, though in Payment; so that it is not to be pleaded as a Discharge of *Tithes*, but as a Discharge of the payment of *Tithes* (a). This *Unity* hath been often Resolved to be a good Discharge of the payment of *Tithes* within the meaning of the Statute of 31 H. 8.

(a) Hob. 44.
297.

(b) Co. 2. par.
Inst. 955.
Mort 46, 47.
Cro. Jac. 608.

(b). Originally this *Unity* was, where an *Abbot*, *Prior*, &c. time out of mind hath been seized of Lands in themselves Tithable, and also of the Rectory of that Parish wherein such Lands did lie: So that *Unity* of the Parsonage and Lands, which should pay *Tithes* by Appropriation or otherwise, in the hands of Religious and Ecclesiastical Persons, had discharged from the payment of *Tithes*: and now since the said Statute of 31 H. 8. such an *Unity* of Possession in the said Religious Houses, and Lands and Persons, shall be a discharge for the King's Patentee for the Lands that came to the Crown by the said Statute. But then it was Resolved, That such an *Unity* must have been *Iusta*, *Libera*, *Equalis*, and *Perpetua*. It must have been *Iusta*, claimed by Right, by good and lawful Title, and not by Disseisin, or other extortions and unlawful Acts; for such an *Unity* had not been a good discharge within the Statute. 2. It must have been *Equalis*, that is, there must have been a Fee-simple both in the Lands and in the *Tithes*, as well of the Lands upon which the *Tithes* are, as of the Parsonage or Rectory; for if those Religious persons had held but by Lease, that had not been such an *Unity* as the Statute intended. 3. It must have been *Libera*, free from the payment of any *Tithes* in any manner; for if their Farmers, Tenants at Will, or Years, had paid any manner of *Tithes* before the Dissolution, it may be a sufficient Bar to avoid the *Unity* pleaded in discharge of *Tithes*. 4. It must have been *Perpetua*, time

time out of mind, that such Religious Houses were Endowed, and such Religious persons had in their hands both the Land and the Rectory before the memory of man, or as it seems (according to the Rules of Common Law) before the first of R. 1. Discharged of Tithes; or if the Appropriation were Ancient, as in the time of Ed. 4. such is said to be a good discharge of Tithes, either on the account of *Perpetual Unity* or of *Prescription* (c). And at this day such an *Unity* is said to be a good discharge of Tithes in the hands of the King's Patentee, within the Statute of 31 H. 8. (d). There may be also (as appears in the Common Law) an *Unity* of Possession, different from the former, which shall likewise discharge from the payment of Tithes; but such Discharge is only *pro tempore*, and therefore though it be an *Unity* of Possession, yet it is not a *Perpetual Unity* in the sense aforesaid: As if a Parson of a Church purchaseth a Mannor within his Parish, by this Purchase, and *Unity* of Possession, the Mannor which before was Tithable, is now become *Non Decimabilis*, because he cannot pay Tithes to himself; but if he maketh a Lease of his Parsonage and Rectory to a Stranger, the Parson himself shall pay Tithes of his Mannor to his Lessee; and so if the Parson maketh a Feoffment of his Mannor, the Feoffee shall pay Tithes to the Parson, because Tithes are due by the Law of God *ex Debito*, and cannot be extinct, into whose hands the Lands come, unless they come to the hands of the Parson himself (e).

Underwood is Tithable; and of *Underwoods* digged up by the Roots Tithes shall be paid; and so of *Fledg-rows* (f); likewise of *Underwood* sold standing, the Tithes shall be paid, and that not by the Seller, but by the Buyer. But *Underwood* used for fencing of Corn or Pasture pays no Tithes (g). An Action of Trespass was brought by a Parson against a Vicar for *Underwoods*, and each of them did claim the *Underwoods* by Prescription as his Tithes, that (although their claim was by Prescription) yet because the right of the Tithes was in debate only, the Temporal Court was ousted of the Jurisdiction of them (h). But if a Parson or Vicar claim a portion of Tithes by Prescription only, which is a Temporal thing, and sueth in the Spiritual Court; it was holden that a Prohibition lieth (i).

In a Prohibition to stay proceeding in the Ecclesiastical Court, upon a Libel there by the Parson for Tithes of *Underwood*, by reason of a Prescription in *Non Decimando*, for the *Wild of Kent*, this *Wood* growing in the *Wild of Kent*, Henden moved the Court for this Prohibition, for these Reasons, (1.) A whole Country generally may Prescribe in *Non Decimando*, in a particular place, and as a whole Country may so do, by the same reason a particular person

(c) Sir Sim.
Dig. Law of
Tithes, ch. 21.
& Hugh. Abr.
Dism. Sect. 3.
Sect. 17.
(d) Co. 11. par.
13. Pridle &
Napper's Case.

(i) Mich. 30 H.
8. Dyer 43.

(f) Mich. 11
Jac. C. B. Sha-
rington's Case.
(g) Hill. 15 Jac.
C. B. Adjudg.
Hidi & Ellis
Case.

(h) 21 Ed. 4.
24.

(i) 29 Eliz. B.
R. by Shuit
and Clark
Justices.
Mich. 12 Jac.
B. R. Russell
vers. Backhurst.
Bulstr. par. 2.

person may. A second Reason; the Statute of 2 Ed. 6. cap. 13. gives life unto this Prescription; for this particular place and precinct. Coke Chief Justice. By *Lindwood*, a whole County may Prescribe in non Decimando; and so is Dr. & Stud. cap. ult. fo. 166. b. But it is with this Proviso, so that there is besides this Maintenance for the Parson; otherwise the same is not good. The Statute of 2 Ed. 6. cap. 13. aids you not at all in this Case, for a private man cannot in this manner Prescribe: And to say, that the Conqueror never conquered this place; this is but Historical and Apocryphal, for he was Conqueror by Composition had. It is true, that in former time, long since this place was not Tithable, because there was no Wood there but great Timber-trees, which were not Tithable, but these being now cut down, wasted, and destroyed by the Iron-Mills, and as in many other places; now this place which was not Tithable before, being now *Underwood*, and converted into Tillage or Pasture, is now become Tithable, and *Tithe* shall be there paid; and if Waste and Barren Ground, for the which no *Tithe* hath ever been paid, if the same be now meliorated and converted into Tillage; now by the Common Law *Tithes* shall be presently paid for this, unless the same be within the Proviso of the Stat. of 2 Ed. 6. of Exemption from payment of *Tithes* for a certain time after the melioration of the same, as appeareth in the Statute, otherwise *Tithes* shall be paid presently. No *Tithes* could formerly be paid here in this place, because there were only great Timber-trees here growing; but now clearly they ought to pay *Tithes* for the *Underwoods*, and this is the only Demand here. The whole Court was clear of Opinion, That no Prohibition should be here granted in this Case, but that *Tithe* should be paid. Coke, Will you allow the Parson here in this place. Tithe-Hay and Corn, and not Tithe-Wood? *Doderidge*, by *Lindwood* and Dr. & Stud. a whole County may be discharged from payment of *Tithes*; but this at the first of necessity ought to have a lawful Commencement by way of Composition, or, &c. Coke agreed with him herein, and said unto *Henden*, Shew unto us an Ancient Writing, by way of a Composition for your Discharge of payment of *Tithes*; the Statute of 2 Ed. 6. makes against you there; though no *Tithe* was ever paid, yet upon the melioration of the Land *Tithes* shall be paid presently, if the Statute had not been made. The Court were all clear of Opinion against the granting of a Prohibition, and so, no Prohibition awarded.

W.

Wages of Servants of the Plough shall not pay any *Tithe*, as hath been Resolved, *Pascb. 14 Jac. B. inter Parson Ellis and Drake*; and Prohibition granted accordingly, although the Libel was but for the *Tithe* of a Third part of their *Wages*, leaving the rest free; for it was said, That by the same reason that the Cattel of the Plough are free of *Tithe*, the *Wages* of the Servants that follow the Plough are *Tithe*-free also.

Waste Pasture Lands, if *Tithes* in-kind be paid for Lambs, Calves, &c. feeding and couching thereon, *Tithes* shall not afterwards in the same year be paid for Agistments on the same *waste Pastures*. *Waste Grounds*, not certainly known in what Parish, and Cattel feeding thereon, the *Tithe* whereof belongs to the Parson of the Parish wherein the Owner of the Cattel doth dwell.

Wax of Bees is Tithable by the Tenth weight thereof. *Tithes* ought to be paid in kind *de jure* of *Wax* and *Honey* of Bees in their Hive. *Mich. 15 Car. B. R. inter Barefoot & Norton*, Adjudged in a Prohibition upon a Demurrer, and a Consultation granted.

Willows, growing in the soil of a Mannor, felled, are not (as is said) Tithable, though it be waste to sell them (a). No *Tithes* shall be paid of *Willows* in a Country where they are used for Timber (b). *Sed Q.* as to the former; for a Record of a Prohibition was shewed to the Court, where a Prohibition was awarded to the Spiritual Court for *Tithes* of *Willows* upon a Surmize, That they are of use as Timber in the County of *Southampton*. And in that Case it was said, If *Willows* grow within the Site of a House, it is Waste to sell them; yet if they be felled, that *Tithes* shall be paid of them (c).

Wood yields a Predial *Tithe*, and regularly to be computed *inter Minutas Decimas*; yet in some Cases may be great *Tithes* in places where it is much sowed; as in *Udal* and *Tindall's Case* (d). The Case was, That in Trespass for taking of two Loads of *Wood*; The Jury found, That if they were *Minuta Decima*, then the Jury found the Defendant guilty, if they were not *Minuta Decima*, than for the Plaintiff: It was said for the Plaintiff, That without more Circumstances it shall not be intended *Minuta Decima*; for it may be, That a great quantity of *Wood* may be sown, and the greatest part of the Commodity in the Parish may consist in it, for *Minute Decima* are but of small

2 H. 4. Ror.
Par. nu. 99.

(a) Hob. 219.
(b) Hob. Rep.
Case 288.

(c) P. 14 Jac.
C.B. rot. 1819.
Geffy and Pindar's Case.
Hob. 219.

(d) Hurr. Rep.
77.

consideration in a Parish, as Herbs in a Garden, and such like: and therefore *Wood* sown in a Field is not *Minutæ Decimæ*. It was Resolved by the Court, That *Wood* growing in the nature of an Herb, the Tithe thereof ought to be accounted *Minutæ Decimæ*, and belong to the Vicar. And the Dean and Chapter of *Norwich's* Case (f) was vouched to prove it, That the Tithe of 40 Acres of Land sowed with Saffron, did belong unto the Vicar, and not to the Parson, because they were *Minutæ Decimæ*; *Hill. 1 Car. C. B. Sir Rich. Udall* and the Vicar of *Alton's* Case. *Cro. 3. par. 20. vid. Hutton 77.* the same Case.

Wood is computed among the *Predial* Tithes, as also among the Great Tithes; yet it hath been Resolved, That if a Vicar be only endowed with the Small Tithes, and hath by reason thereof always had the Tithe-wood, that in such case it shall be accounted a Small Tithe; otherwise it is to be accounted among the Great

(f) Rol. 1. 643.
v. 2. Bull. 27.
(b) Adjudg.
Trin. 19 Jac.
B. R.

(i) Adjudg.
Hill. 16 Jac.
C. B. *Leonard's*
Case, & 4 El.
B. R. *Foster and*
Leonard's Case.
Adjudg'd ac-
cordingly.
Cro. 2. par.
199. acc.

(k) By *Hobart*
Chief Justice.
(l) M. 4 Jac.
B. R.

(m) 15 Jac.
C. B. *White and*
Bickerstaff's
Case.

(n) Tr. 4 Car.
C. B. *Norton &*
Farmer's Case.
(o) Dist. *Bick-*
erstaff's Case.
(p) 2 Ed. 6. 13.
vid. Rol. 1.
656. l. 1.

Tithes (g). *Wood*, or a great *Wood* consisting for the most part of Underwoods, only some great Trees here and there *sparsim* therein, the whole *Wood* is Tithable, unless they be specially exempted (h). But if the *Wood* for the most part consist of Timber-Trees, only some small parcel of Underwoods or Bushes in the same, no Tithe shall be paid of such *Wood*; the Timber-Trees do in that case privilege the rest of the *Wood* (i). *Wood* converted into Arable, shall not be discharged of Tithes, as Barren Land within the Statute of 7 Ed. 6. Trin. 12 Jac. B. R. Case *Maschal & Price. Roll. Rep.* The tenth Acre of *Wood* in a Coppice is a good payment of the Tithe, specially if such be the Custom of Tithing *Wood* in that Country; otherwise *Wood* in a Coppice or the like, cut and sold, the Tithe thereof is to be answered not by the Buyer, but the Seller, as some conceive; which by others is opposed, who hold, That the Buyer, not the Seller of *Woods* felled to be sold, shall answer the Tithe: the Reason is, because Tithes do follow the Fruits; yet the Parson for his Right, hath his Remedy against either: But *Wood* of Coppices or Trees that one cuts and spends in his own House-keeping, though he spend much, is not Tithable (k), unless the Parson can alledge and prove a special Custom to the contrary (l); for generally *Wood* used for Fuel in House-keeping is not Tithable (m), *sed Qu.* the Custom, it being not *so per Legem terræ* (n). Nor is there any Tithe to be paid for such *Wood* as is cut for Hop-poles, where Tithe is paid of the Hops (o). But where *Wood* is grubbed up, the Land that thereby is made, fit for the Plough, shall pay Tithes presently. And if the Tithes of *Wood*, after the Inheritance thereof sold be subtracted, the Parson may by the Canon-Law implead either the Buyer or the Seller at his choice, though he can recover but of one; but now by the Statute (p) the Seller only unto

unto treble damages. If there be Parson and Vicar in one Church, and the Vicar hath the Tithe of Woods, and the Parson the Tithe of the Pasture, and Wood be felled for Fencing and enclosing the Pasture, the Vicar shall not have Tithe of the Wood (q). Woodlands converted into Arable or Tillage are not discharged of Tithes, as Heath, Waste, or other Barren Grounds, within the Statute of 7 Ed. 6. Trin. 12 Jac. B. R. Case *Maseball* vers. *Price* in fin. *Roll. Rep.* A Prohibition in another Case was granted to stay a Suit for Tithe-Wood, upon a Surmize, That the Wood was spent in his House for Firing, and shews that the Custom in the same Parish is, That the Owners of any House and Land in the said Parish, who pay Tithes to the Parson, ought not to pay Tithe of Wood spent for Fewel in their Houses: And Issue being upon this Custom, it was found for the Defendant. It was moved in Arrest of Judgment, That although it be found there is no such Custom, that yet he ought not to pay Tithe for Wood spent in his House, nor for Fencing-stuff for Hedges, but *per Legem terræ* ought to be discharged of them: But it was Resolved by the Court, That it is not *de jure per Legem terræ*, that any be discharged of them; for it is usual in Prohibitions, to alledge Customs, or by reason of other Lands whereof he pays Tithes, that he is discharged of that Tithe, but not to alledge, that *per Legem terræ* he is discharged: And in this Case, the Plaintiff in the Prohibition having alledged a Custom, and it being found against him, it was Adjudged for the Defendant that a Consultation should be awarded (r). By Custom Tithes may be paid for Wood spent in a mans own House. Mich. 14 Jac. B. *Wasy* and *Hanberry* Agreed. And albeit there are some Trees, of what age or bigness soever they be, that are regularly to pay Tithes, as Willows, Hasels, Hollies, Maples, Birchs, Alders, Thorns, &c. (s); yet if they are cut for Fencing of Grounds, or for Fewel to be spent in the Houses of the Owner within the same Parish, no Tithes shall be paid thereof, unless it hath been otherwise by Custom (t). Also Wood cut for Burning of Bricks, to be used for repair of the Owners Buildings in the same Parish, pay no Tithes: otherwise if used for Bricks to sell, or for making Houses not of necessary habitation, so as the Wood in its own nature be Tithable (u). Likewise Tithe shall not be paid of the Roots of such Coppice-Wood, as paid Tithe at the cutting thereof, if such Roots were soon after the cutting such Wood, grubbed up to cleanse the Ground (w). If Woodlands be mixt with Woods partly Tithable, partly not Tithable, it hath been held, That if the Major part be not Tithable, it shall privileged the rest: but if the greater part be Tithable, then all that is Tithable shall pay Tithes (x). Touching the manner of Tithing of Wood and Trees,

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and

(q) Hill. 15 Jac.
C. B. *Hide* &
Ellis Case. 10
Adjudged.

(r) Tr. 4 Car.
C. B. Cro. 1.
par. 80. Norton
& Fermor's
Case.

(s) Hob. 288.
& 215. Rol.
649. p. 6, 7, 8.
Noy 30.
Cro. Jac. 159.
(t) Co. 2. Inst.
652. Cro. El.
499, 609. &
Cro. Car. 113.
More 683.
Rol. 1. 644.
Z. 1, 2, 3.
(u) Rol. 1. 645
Z. 8, 9, 10.
(w) Rol. 1.
637. e. 7.
(x) Tr. 19 Jac.
B. R. *Buckhurst*.
vers. *Newman*.
Trin. 36 El.
B. R. *per Hen-*
din Parf. Law.

(y) Co. 11. par.
48, 49, 81.
Plow. 470.
Brownl. 1. par.
94. & 2. par.
150. Doct. &
Stud. 69.
Pasch. 5 Jac.
Man verli. Sa-
merton.
Brownl. Rep.
pa. 1. Actions of
Debt.

Tr. 14 Jac. B.
R. Parson Ellis
and Drake.
Tr. 38 Eliz. B.
R. Parf. Ran &
Patteson, &
Tr. 10 Car. B.
R. Brown &
Nixon, per Cur.

Mich. 17 Jac.
B. R. Rol.
Rep. par. 2.

and how the *Tithes* thereof are to be paid and delivered, the Reader for his better satisfaction may consult the Authors in the Margent (y).

The Parson of *Henly* brought an Action of Debt for 600 *l.* upon the Statute of *E. 6.* for not setting forth of *Tithes* of Wood, and shews, that the Defendant had cut down 200 Load of Wood, to the value of 200 *l.* and saith, that the Tenth part of that did amount to 200 *l.* and so he brought his Action for 600 *l.* upon the Statute : And the Plaintiff was Non-suit for one fault in his Declaration ; for whereas he declares the price of the Wood to be 200 *l.* it was mistaken, for it should have been 2000 *l.* for he demanded more for the Tenth part than the Principal is, by his own shewing. If a man buy Wood Tithable, and burn it in his own House, he shall not pay *Tithes* thereof, as hath been Resolved. And no *Tithes* shall be paid for Wood cut and employed for the Enclosures in the Husbandry. Also if a man cut Wood and burn to make Brick for repairing of his Dwelling-house for himself and his Family within the Parish, no *Tithes* shall be paid for that Wood ; in regard the Parson hath benefit by the labour of the Family : otherwise it is, in case the Bricks were only to enlarge his house within the Parish, and more than needful for his Family, as for his pleasure or delight. If a man sell Wood to me, and I burn it in my house, the Vendor shall stand charged for the *Tithes* thereof, and not the Vendee, for no *Tithes* are due for Wood burnt in the Parishioners house, as hath been Resolved. *Pasch. 14 Jac. in B. Parson Ellis and Drakes Case*, and Prohibition granted accordingly : Although it was said, That by the *Civil* (or rather *Canon*) Law, the Parson hath his Election to Sue either of them ; which is contrary to the Common Law.

In the Lord *Clanrickard's* Case against Dame *Denton*, the Plaintiff summarized to the Court, That all the *Vill. of Kent*, which is a Precinct containing above forty Parishes time out of mind, &c. have been discharged of the payment of *Tithes* of Wood under the age of 120 years, and the Defendant had sued him in the Ecclesiastical Court, and hereupon had a Prohibition. And the Defendant Traversed the Custom, which a Jury was taken at the Bar to try ; and for inducement of the Custom, *Linwood* was produced in *Cap. de Decimis*, where it is said, That before that time *Tithes* were not paid for Wood, which is contrary to the *Old and New Testament*, and that Assertion is made by *Stratford* Archbishop of *Canterbury*, for that this was a Provincial Constitution, that at that time, *viz.* 17 *E. 3.* *Tithes* of *Sylva cadua* shall be paid ; By which Constitution the Commonalty finding themselves grieved, exhibited a Bill in Parliament the same year 17 *E. 3.* reciting the Ancient Usage of not paying such *Tithes*, and the last Constitution to the contrary, and prayed

prayed a Prohibition to the contrary: To which Bill answer was made in this manner, *viz.* Be it done in this case, as it hath been done before this time. And the next year another Petition was made in Parliament for the same cause; to which it was answered also, That where *Tithes* of Wood have not been used to be paid by Custom, that a Prohibition shall be granted: And these Acts of Parliament the Plaintiffs Council produced out of the Parliament-Rolls. Crook Justice gave the Rule, *viz.* *Quod de grossis arboribus Decimæ non dabuntur, sed de Sylva Cædua Decimæ dabuntur. Vid. Dr. & Stu. 164. a. 169. b.* Anscombe said, The Doctor and Student mistook the maker of that Constitution of Stratford Archbishop.

In a Prohibition for *Tithes* of Wood it was suggested, That in the Parish there is a Custom, that all the Parsons of the said Church, time out of mind *Habuerunt & garissi fuerunt* such Lands parcel of the Mannor of E. in recompence of all Tithe-Wood within the Parish: It was the Opinion of the Justices, that it was a good Prescription: for it may be that at the beginning all the Land was parcel of the Mannor, and then the allowance of the Profits of this Land was allotted in discharge of the *Tithes* of all the Woods within the Parish.

In Prohibition to stay a Suit in the Ecclesiastical Court for Tithe-Wood it was shewed, that the Custom of the Parish is, That the Owners of any House and Land in the Parish, who pay *Tithe* to the Parson, ought not to pay *Tithe* for Wood spent for Fewel in their Houses. It being found for the Defendant, the Issue being upon the Custom; It was said, That notwithstanding there were any such Custom, yet *Tithe* ought not to be paid for Wood spent for Fewel, nor for Fencing stuff, but *per Legem terræ* he ought to be discharged thereof. Resolved, It is not *de jure per Legem terræ* that any one is discharged of them; for it is usual in Parishioners to alledge a Custom, but not to alledge that *per Legem terræ* he is discharged: And in this case the Plaintiff in the Prohibition having alledged a Custom, and it being found against him, a Consultation was awarded.

Norton and
Hermor's Case.
Cro. par. 3.

A Composition was betwixt an Abbot and a Parson, that in recompence of the *Tithes* of all the Woods within the Mannor, whereof the Abbot Owner, That he should have to him and his Successor 20 Loads of Wood every year in 20 Acres of the said Mannor to burn and spend in his House: The Parsonage was Appropriate to the Abbey, and after the Abbey was dissolved; the King granted the Parsonage to one, and the 20 Acres to another. It was Resolved, That by the Unity the Estovers were not extinct; for if they be *Tithes* that are not extinct by this Unity of Possession, for that *Tithes* run with the Lands: and *Tithes de jure Divino & Canonica Institutione* do appertain to the Clergy.

- Wool of Sheep is Tithable proportionably to the time they are in the Parish; as thus, *viz.* The Parson shall have Eight pound of Wool in Eighty, or Forty Sheep in the Parish a whole year: Four pound of Wool in Forty, if they were there but half the year: Two pound of Wool in twenty, if they were there but three months: and but the Tithable or Tenth of the twelfth part of the Wool, if they lay and fed but one month in the Parish. The Wool of Sheep shorn and dying before *Easter* next following such shearing, is not Tithable, unless the Parson or Vicar can alledge a special Prescription for it. Therefore Q. where by Prescription such Tithable is claimed (a) It is said also, That a Custom to pay a Half-penny for the Wool *de ovibus venditis* after shearing and before *Michaelmas*, is good; and that the Sheep discharged shall be Weathers as well as Ewes (b). Also Wool-locks and Flocks of Wool, after the Wool made, are likewise Tithable, if there be more than ordinary left, otherwise not: And if a Prescription be alledged to be discharged of Locks of Wool, it must be set forth of Wool casually lost (c). For Wool and Lamb, no Action lies upon the Statute for not setting out of Tithes, for they are no Predial Tithes: and no Action lies upon this Statute for small Tithes, *vid. Brownl. Rep. part. 1. Cases in Law, &c.* yet Wool and Lamb are said to be Predial mixt Tithes: *Mich. Fac. 8. B.* By the Decree or Canon of the Provincial Constitutions the payment of the Tithable of Wool is regulated as the Tithable of Lambs, *viz.* That if the Parishioner hath under Seven Fleeces, he shall pay a Half-penny for every Fleece; and if there be Seven Fleeces and under Ten, then the Parson or Vicar is to allow a Half-penny for every one that is wanting of Ten. *Lindw. cap. Quoniam propter.* And albeit by the said Decree, Election is given to the Parson to receive his Tithable in manner aforesaid, or to let them run on till a Fleece in kind be due in the ensuing year; yet it seems by the Common Law Tithes must be paid annually (d). Although Tithable cannot be denied of Locks and Pelts of Wool where there is much in quantity; yet it hath been Resolved, That where Tithable Fleeces of Wool are paid, there shall be no Tithable paid of the Locks and Pelts of Wool (e). Also where the Custom is to shear the Necks of Sheep about *Michaelmas*, to prevent the tearing off of the same by Thorns and Bryers in the Winter, if this be done without fraud, and not to deceive the Parson, then no Tithable shall be paid for the same (f). But for the Wool of Sheep dying of the Rot, or any other disease, or kill'd or sold by the Owner, Tithable shall be paid ratably for the same (g). And yet it hath been otherwise Resolved, and that Tithable shall not be paid of the Pelts and Fells of Wool of Sheep which die of the Rot, without a Special Custom for it: For where the Vicar of *Kilmonfden* in the County
- (a) Fitz. N. B. Consultation 51. 8.
- (b) More. 1283.
- (c) More. Ibid.
- (d) P. 14 Eliz. Harpur's Rep.
- (e) Cro. El. 363. T.
- (f) Rol. 1. 645 z. 14, 15. 16. Bullstr. 1. 3. 242. Foss & Parker's Case.
- (g) Rol. 1. 646, z. 18.

of *Somerſet*, Libelled in the Eccleſiaſtical Court for Tithe of the Wool of Sheep, which died of the Rot, a Prohibition was granted (b). Nor ſhall Tithe be paid of the Wool of thoſe Sheep, which after they be ſhorn, do die before the Feaſt of *Eaſter* next following: The Reaſons are, (1.) Becauſe they are but of ſmall or no value. (2.) Becauſe the Owner of the Sheep hath paid Tithes for them the ſame year, and there ſhall not be a double Tithe paid for one and the ſame thing in one and the ſame year. (3.) Becauſe Tithe ſhall be paid of the clear profit only: but if the Sheep do die before the Feaſt of *Eaſter*, all the profit of them is loſt, for which reaſon to demand Tithes for the ſame, were, *Afflictionem addere Afflicto* (i). Where a Prohibition was prayed, becauſe the Parſon Libelled in the Eccleſiaſtical Court for the Tenth part of a Bargain of Sheep, which had depaſtured in the Pariſh from *Michaelmas* to our *Lady-day*: the party ſurmizing, That he would pay the Tenth part of the Wool of them, according to the Cuſtom of the Pariſh. The Court would not grant a Prohibition, for that by this way the Parſon might be defrauded of all, and the Sheep being now gone to another Pariſh, he cannot have any Wool at this time, becauſe it was not the time or Seaſon of ſhearing. Note in that Caſe it was ſaid, That *de Animalibus Inutilibus*, the Parſon ſhall have the third part of the Bargain for Depaſture, as Horſes, Oxen, &c. But *de Animalibus Utilibus*, he ſhall have Tithe *in ſpecie* (k). Finally, to obtain a Prohibition a man alledged *inter alia* a Cuſtom, That they uſed to clip the Wool from the Necks of their Sheep for the preſervation of them, as aforeſaid, and at Shearing they uſed to pay the Tenth Fleece, in conſideration whereof they uſed to be diſcharged of the payment of Tithes for Neck-Wool: Iſſue being joyned upon this and other Preſcriptions then Pleaded, and found againſt the Plaintiff, It was moved, That no Conſultation might be awarded; but it was Adjudged for the Defendant; for the Prohibition is grounded upon the Preſcription, and being found againſt it, that, &c. Wherefore being found for the Plaintiff, a Conſultation was granted. *Trin. 18 Jac. B. R. Jouce & Parker's Caſe. Cro. 2. par. 575. vid. Bulſtr. 3. par. 242, 243. the ſame Caſe. Hughe's Abridg. Diſmes, Sect. 5. Sect. 23.*

An Action of Debt brought upon the Statute of E. 6. for not ſetting forth of Tithes, and the Plaintiff declared as well for the Pre-dial Tithes, for which he might well bring his Action, as for other Tithes, as of Wool and Lamb, for which no Action on that Stat. would lie; and upon Trial the Jury found for all, as well for thoſe that would, as would not bear an Action; and after a Verdict this Exception was taken, and Judgment arreſted. If a man pay Tithe of Lamb at *St. Marks-ſide*, and after at *Midſummer* he ſhear the reſt

(b) *Tr. 3 Car. B. R. Aſhton & Miller's Caſe.*

(i) *15 Car. B. R. adjudged. vid. M. 2 Car. B. R. Poph. 197. Hugh. Abr. Diſmes, Sect. 5. Sect. 21.*

(k) *Mich. 2 Car. B. R. Hob. 197.*

Trin. 8 Jac. Rot. 134. Pain verſ. Nichols. Brownl. Rep. par. 1. Aliens of Debt.

Palch. 16 Jac.
inter Nicholls
& Hooper, per
Cur.

Tr. 12 Jac. B.
R. between
Marshall and
Priest. Dubit.
Mich. 14 Jac.
B. R. between
Joyse and Par-
ker, per Cur.

Case Ibid.

P. 14 Car. B. R.
inter Dent &
Salvin, per Cur.

Ibid.

Jesop & Paynes
Case.
Cro. par. 1.

rest of the Lambs, viz. the Nine parts, he ought to pay the Tithes of Wool for them, although there be but two months between the time of payment of the Tithes of the Lambs that were not shorn, paid with their Fleeces, and the shearing of the rest, for it is a new increase; in this case Prohibition was therefore denied. But a man shall not pay any Tithes of Herbage of Sheep, for that he pays Tithes of the Wool, for otherwise he should pay Tithes twice of the same Increase. If a man shear his Sheep only about the Neck to preserve them from the Vermin, and not for the profit of the Wool, the Parson shall have no Tithes thereof; but otherwise it is, if they are much shorn by Covin for the benefit of the Wool: the Law is the same, if they are shorn about the Necks without fraud but two months before and two months after Michaelmas to preserve them and their Fleeces from the Brambles, no Tithes shall be paid thereof, for it appears that they were not shorn for the benefit of the Wool, it being done at that time before the Fleeces are increased after their being shorn throughout. Likewise, if a Parishioner cut off the dirty Locks of his Sheep, for their better preservation from the Vermin, before the Shearing-time, and that without fraud, no Tithes shall be paid thereof; and Prohibition granted in this case. But if a man kill Sheep, he shall yet pay Tithes of the Wool that comes of them, but not for their Skins.

For a Prohibition for suing for Tithes of Locks of Wool, it was suggested, he had payed the Tenth Fleece of Wool in satisfaction of all Locks and Tithes due for Wool: The Court held, That in this case the substance of the Prescription was good enough, because Locks be not of the same value with the Fleece: But in regard of a fault in the Suggestion, that it was not (*that they had usually paid*) which is issuable, a Consultation was awarded.

CHAP.

CHAP. XXXIII.

Of Banns.

1. Whence the probable derivation of that word, and what it signifies.
2. The manner and form of Publication of Banns according to the Provincial Constitutions.
3. By whom Licences for Dispensation of Banns may be granted according to the Canon; Also to whom, and under what Conditions or Cautions.
4. Requisites or Preparatories in Law unto such Licences.
5. A Case at Common Law, with the Resolutions of the Court relating to Banns, with the Power of the Ecclesiastical Jurisdiction therein.

(1.) **B**ANNUS (*bannus vel bannum*) if Ban in the Brittilh Language signifies *Clamor*, as Mr. Blount gives it in his *Nomo-Lexicon*, then we need seek no further for its Derivation: *Bannus*, *Q. an non declinata voce a Græc. βᾶν omne, βᾶν πᾶν innotescat. Mutatur enim facile α in β.* For though the Word be frequently mentioned by the Feudists, and thence applied to other uses, as to that which we here in this Kingdom call a Proclamation, whereby any thing is by Authority publicly Commanded, Permitted, or Forbidden, *Vincen. de Franch. Decis. 521. & 360.* yet in the Sense here meant and intended, it is not so properly a Proclamation as a Publication or a publick Notice-giving. And therefore by the word *Banns*, as we use it, is intended that publishing of Matrimonial Contracts in the Church *tempore Divinorum*, before Solemnization of Marriage, to the end, That if any have ought material to object against the intended Marriage signified by such Publication, either in respect of Pre-contract or otherwise, they may seasonably make their Exception against it, consonant to the very Letter of the Canon Law, where *Banna sunt proclamationes Sponsi & Sponsæ in Ecclesiis fieri solitæ, c. 27. extr. de Spons. & c. ult. Qui Matrim. accus. pos. &c. ult. de clandest. Despon. vid. Gothof. ad Nov. Leon. 89. in med. ibi.* *Hottoman* is very confident that there is both *bannus* and *bannum*, and that they signifie Two distinct things, and neither of them to our purposes; for according to his Exposition, the one should signifie an Edict what day their Vassals or Slaves furnish'd with Horse and Arms,

shall:

shall encounter one another; the other a Sanction or Decree, that is, a Mulct or Fine imposed on him that does not obey the Edict. *Hottom, in verb. Bannus. De verbis Feudalibus.*

(2.) In the Provincial Constitutions *Banna* are publick Proclamations or Denunciations; *Lind. Provin. Confit. de cland. Despon. c. 1. glos. verb. Bannorum.* Others describe them to be *Edicta publice proposita*; *Petr. de Anchor. in cap. cum in tua Ext. de Sponsal.* By the said Provincial Constitutions that *Banns* ought to be *Solemn Publications*, that is, they ought to be thrice published in the Parochial-Churches where the contracting Parties and their Parents dwell, on three Sabbath-days or three Festival-days (allowing some interval of time between each) at the time of Divine Service, when most of the Parishions are assembled together, by the Parsons of the said Parishes respectively, or others in holy Orders, at such times and Seasons wherein Solemnization of Marriage is, not Canonically prohibited, *glos. verb. Bannorum, ubi supra.* Yet where three Festivals immediately succeed each other, such Publication in them made, holds good in Law; *Prov. Conf. de Spons. glos. in verb. a se distantibus*: As also shall the Marriage it self, when once solemnized, albeit such Publication of *Banns*, as aforesaid, did not precede the same, *gl. in v. Solen. Edit. de cland. Despon. ubi supra.*

(i) Can. 101,
102, 103, 104.

(3.) But by the Ecclesiastical Canons now in force, it is Ordained, (1.) That no Licence for the Solemnization of Marriage shall be granted, without thrice open Publication of the *Banns*, according to the Book of Common Prayer, by any Person exercising any Ecclesiastical Jurisdiction, or claiming any Priviledges in the right of their Churches; but shall be granted only by such as have Episcopal Authority, or the Commissary for Faculties, Vicars-General of the Archbishops and Bishops *sede plena*, or *sede vacante*, The Guardian of the Spiritualities, or Ordinaries exercising of right Episcopal Jurisdiction in their several Jurisdictions respectively, and unto such Persons only as be of good State and Quality, and that upon good caution and security; which shall contain these four Conditions. (1.) That therein is not any Impediment or Precontract, Consanguinity, Affinity, or other lawful Cause to hinder the said Marriage. (2.) That there is not any Suit depending in any Court before any Ecclesiastical Judge, touching any Contract or Marriage of either of the said Parties with any other. (3.) That they have the consent of their Parents or Guardians. (4.) That they shall celebrate the said Marriage publicly in the Parishi-Church or Chappel where one of them dwells, and that between the hours of Eight and Twelve in the Forenoon: *Pasch. 8 Car. B. R. Case Marripley vers. Martyn.* It was Resolved, That if any Marry with-

without Proclamation of *Banns*, or Licence to dispence therewith; they are citable for the same in the Ecclesiastical Court and no Prohibition lies in the case. *Jones Rep.*

(4.) Before any such Licence (as aforesaid) can be granted, it must appear to the Judge by the Oaths of two sufficient witnesses, that the consent of the Parents or Guardians is thereunto obtained; and one of the parties must personally swear, that he believes there is no Let or Impediment of Precontract, Kindred or Alliance, or of any other lawful cause whatsoever, nor any Suit commenced in any Ecclesiastical Court, to hinder the said Marriage according to the Tenor of the said Licence; But in case the Parties be in Widowhood, then the Clause relating to the Parents Consent may be omitted; the penalty for offending in the Premises is six months suspension *ab executione Officij* in any Commissary for Faculties, Vicars General, or other the said Ordinaries, together with vacating of every such Licence or Dispensation, and subjecting the Parties marrying to the punishments appointed for clandestine Marriages. The *Synagmatist* tells us, that there is a Canon extant, made by *John* Metropolitan of *Muscovy*, who is held as a Prophet in *Russia* to this day, that *Matrimonium non nisi publice in Ecclesiis contrahatur*. *Petrus Gregor. Tholos. (k).*

(k) *Synt. jur. l.*
9. C. 5. B. 10.

(5.) In the Case of *Matingly* against *Martyn* it was resolved (1) That the Cognizance of all Fornications, Adulteries, and suspected living in Adultery doth appertain to the Ecclesiastical Court. (2) That if any marry without Proclamation of the *Banns*, and without a Licence to dispense therewith, they are citable in the Ecclesiastical Court for the same, and no Prohibition lies in that case (as aforesaid.) (3.) That if any Licences to marry without *Banns* be granted by the Ordinary of the Diocess, or by Commissaries or Officials in their Jurisdictions, or by the Archbishop in his Province before the Statute of 25 H. 8. The Cognizance of the sufficiency of such Licence, of the Form of the Dispensation, and of the Conditions and Provisoos of such Licence, and whether sufficient Notice thereof were given or not, are examinable only in the Ecclesiastical Court; and when the Licence is sufficient, and the Provisoos well and duly observed, and Notice thereof, and this be refused or rejected in the Ecclesiastical Court, yet no Prohibition lies, but the Party grieved must have his remedy by way of Appeal, and not otherwise. (4.) That where power is given by Act of Parliament to the Archbishop to grant Licence either *de novo* or in Confirmation of his Authority; yet the form of the Dispensation, and the

Pasch. 8 Car.
B. R. Matingly
vers. Martyn.
Jones Rep.

B b b b

obser-

observation of the Provifes and Conditions thereof, and whether sufficient notice was given or not, are examinable in the Ecclesiastical Court; and if they there adjudge in that Case irregularly, no Prohibition lies, but the Remedy is only by way of Appeal; But if it come into question in the Ecclesiastical Court, whether the words of the Act of 25 H. 8. do give sufficient power to the Archbishop to grant a Licence, there if the Ecclesiastical Court doth judge against the power, a Prohibition lies, and not otherwise; but if they allow the Licence in point of power, and only insist upon the Form, and Notice, and other Circumstances, in such case a Prohibition doth not lie: For though a power to grant Licences be by Act of Parliament, which is a Temporal thing, yet the License it self remains an Ecclesiastical thing, and the examination of all these things, (saving the Power) remains to the Ecclesiastical Court as it was before.

C H A P. XXXIV.

Of Adultery.

1. *What Adultery, why so called, and in what Court Cognizable.*
2. *The punishment of Adultery under the Levitical Law; and what it was anciently by the Civil Law.*
3. *The several Punishments thereof anciently according to the Quality of the Offenders respectively.*
4. *Adulterers compared to Idolaters; strange punishments of Adultery among the ancient Pagans.*
5. *The Severity of certain Ecclesiastical Laws in ancient times against Adultery.*
6. *The Customs among the Arabians, Mahumetans, Tartars, Indians, Pagans, in punishing Adulteries.*
7. *The Civil Law touching Jealousie, and second Marriage, the former Husband then living.*
8. *Adultery, what in sensu largo; how the punishment thereof is now mitigated at the Civil Law to what it was anciently; and how punished at the Canon Law.*
9. *The diversity of Punishments inflicted on Adulterers, according to the divers Customs of Nations respectively.*
10. *In what respect the Temporal Laws take some Cognizance of Adultery.*
11. *What the Saxons of old in this Kingdom called the Punishment of Adultery; the remarkable Case of Sir Jo. de Camois.*
12. *Adultery falls under a threefold Consideration of Law; the History of the Adulterous Stork.*

(1.) **A** DULTERY, or *Adulterium*, quasi [*ad alterius* *thorum*] where the Rights of lawful Matrimony are violated, *Lindwood's Const. de Offic. Archiepisc. verb. tertium mandat.* is the Inconvenience of Married persons, or of persons whereof the one at least is under the Conjugal Vow. This is properly cognizable within the Ecclesiastical Jurisdiction; the Conviction whereof is by Examination and other Legal proof requisite by the Law of the Church; which if committed by any of the Clergy, duly convicted thereof, he was punishable by Imprisonment at the discretion of the Bishop or Ordinary of that Diocese wherein he resides (b).

Adulterium est illicitus Concubitus conjugatus & conjugatus.

(b) *Sc. 1 H. 7.*

(2.) By the Levitical Law Adultery was punished with Death in both Sexes, (c) yea stoned to death. (d) By the Civil Law also, which calls it the Violating of another mans Bed, the Punishment anciently was Death, both in the Man and in the Woman; But afterwards the punishment was mitigated by that Law as to the Woman, she being first whipt, and then shut up in a Monastery, but by the Canons other Laws are inflicted.

(3.) At the Synod in Ireland, held by St. Patrick and other Bishops *An. 456.* by the 19th Canon thereof the Adulterers were to be excommunicated. At the Council held at *Bergbamstead* by *Bertwald* Archbishop of *Canterbury*, the Bishop of *Hereford* and others in the fifth year of *Witred* King of *Kent An. 697.* several Laws were made against Adultery, according to the several qualities and conditions of the persons offending respectively; beside Excommunication against all such, if the Adulterer were an Alien he was to depart the Land, and to take his Sins and his Estate away with him; If a Souldier, then to be fin'd five pounds: If a Rustick or Country Husbandman (known in the Law by [*Paganus*]) then to pay fifty Shillings; if a Priest, then to be inhibited from administering the Sacrament of Baptism.

(4.) *Boniface* Archbishop of *Mentz*, when he was the Popes Legate in *Germany, An. 745.* in his Epistle to *Eitelbald* King *Mercia*, compares Adulterers to Idolaters; and moreover says, that the *Greeks* and *Romans* compared Adultery to *Blasphemy*, when committed by or with one of religious Order, and adds, that among the *Pagans*, in the time of the old *Saxons* the very practice was, that if a Virgin Adulterously defil'd her Fathers Family, or a Married Woman plaid the Whore, they were enforced to be their own Executioners, and by their own hands to reduce themselves by Strangling to dead Corps, which being after burnt, the Adulterer was hanged over the Ashes thereof; and at other times the Adulteresses were by those of their own Sex, out of their zeal to Chastity, whipt from Village to Village, till they were whipt to death. *In Antiqua Saxonia, ubi nulla est Christi cognitio, si Virgo in paterna domo maritata, sub Coniuge fuerit adulterata, manu propria strangulata cremant, & supra fossam sepultæ corruptorum suspendunt; aut cingulo tenus vestibus abscessis flagellant eam castæ matronæ, & cultellis pungunt, & de Villa in Villam inter se occurrunt novæ flagellatrices, donec interimant.* By the Laws of *William* the Conqueror the Adulterer was to be put to death. *Si Pater deprehenderit Filiam in Adulterio in domo sua, seu in domo Generi sui, bene licebit ei eum (lege forsan occire, occidere) Adulterum.*

In Epist. Boni-
fac. ad Eitel-
bald. Ang. Reg.
Antiq. Brit. f.
60. n. 20.

Seldeni ad E-
admerum Notz
& Specilegium
P. 185. l. 37.

(5.) In

(5.) In the Ecclesiastical Laws of *Reverb King of Scots*, *Ann.* 840. by the 14th and 15th Canon thereof it is ordained, that he who deflowers a Virgin, shall die for it, unless she desires him for her Husband; and that he who adulterates another mans Wife not dissenting, both shall suffer the severest punishment, unless she were under force, in which case she shall be acquitted. By the Ecclesiastical Laws of *Hel Dda King of Wales*, *Ann.* 940, it was a sufficient cause of Divorce, if a Woman did but kiss any other Man than her Husband. *l.* 181. Yea she must lose her Dower and all her Rights by that Law, and only for a kiss; and by the same Law Adultery in the Man was held as a kind of Hostility. In the time of the latter Saxons by the Ecclesiastical Laws of King *Edmund*, *Ann.* 944, Adulterers and Murderers had one and the same punishment and both alike denied Christian Burial. After him, by the Ecclesiastical Laws of King *Knute*, *An.* 1032. Adulterers and such as violated the Chastity of a Widow or a Virgin, were to be banished and their Estates confiscated: And in case a Wife played the Strumpet, her Husband living, he was to possess himself of all her Estate Real as well as Personal, and she to have her Nose and Ears cut off, and an indelible Blot with perpetual Infamy to remain upon her Family.

(6.) The *Arabians* (as *Strabo* relates) though they used Incestuous Copulation with Sister and Mother, yet punished Adultery with Death; but that only was Adultery in their account, which was out of the same Linage or Kindred, for otherwise, All of the same Blood to use the same Woman, was but their (Incestuous) Honesty. And by the very *Alchoran* not only is an unchast Look on another Mans Wife forbidden, but also if a Wife be convicted of Adultery by the Testimony of four Women, she is confin'd to perpetual Imprisonment in her own house till she dies, and none suffered to come at her: And in some part of the Grand Seigniors Territories the Turks have a custom to thrust the Adulterers head into a Dung-Wallet of the Paunch of a Beast new killed, and so to carry him through the Streets; but for a Christian to have Carnal knowledge of any of their Women, is Death, unless he turn *Turk*. And with the *Tartars* their Women are so chaste, as that Adultery is seldom heard of among them, but when it happens to be committed, they punish it also with death (e). Among the very *Pagan Indians* as at *Dominica*, *Cuiana*, *Bantam*, *Japan*, and other parts of the *Indies*, Adultery is punished with death: (f) Likewise the *favians* and *Chinois* or *Chinenses* inflict the same punishment of death on Adulterers; and at *Pequin*, the City where the King of *China* makes his Residence; the Dowries or Joynures of convicted Adulteresses are bestowed on the Hospitals of

Fe-

(e) Vln. l. 3.

c. 86.

(f) Scot. Hist.

- (c) Purch.
Pil. p. 3. 3. l. 2.
c. 2. sect. 5.
(b) Lelius c. 17.
(i) Mex. Hist.

Female Orphans; (g) and at *Potomac*, a Province joyned to *Gbina*, their Noble Personages are for Adultery even by their own Parents either strangled or stab'd to death, at their own choice which. At *Brazile*, the Husband might kill his Adulterous Wife, (b) and at *Mexico* or *New Spain* Adultery was death; (i) also by the Laws of the *Inguas*, the ancient Lords of *Pern*, Adultery and Incest with Ascendents or Descendents in the direct Line was punished with death; yet they held it no Adultery to have many Wives, wherof one only was principal, with whom Marriage was contracted, whom they Wedded and received with a particular Matrimonial Ceremony. She only was held as the Adulteress and with the Adulteress all for it; the others being rather Concubines than Wives, were not understood by them as capable of this Offence or Punishment (k). Indeed in the Kingdom of *Angola* in *Aethiopia* and at *Bengalla* in the *Indies*, Adultery is but the loss of the Adulterers Nose (l), and in *Guinea* it is in the Woman but a Divorce and Banishment from her house, and in the Adulterer but a forfeiture of 24 *Peso's* of Gold to the King; and among the *Jeaus*, now since the Sword and Scepter departed from *Judah*, it is but a Penalty instead of a punishment, and but a standing up to the *Chin* in cold Water to quench the Flames of Lust. These Prefidents are not here quoted for Laws, but only to let us see what Constructions even *Pagans* and *Mahumetans* have made of Adultery.

- (k) Purch. Pil.
p. 3. l. 5. c. 6.

- (l) Lins. c. 16.

(7.) By the Civil Law, a man jealous of his Wife, may accuse her before a Competent Judge of Adultery; if after three Admonitions, in the Presence of three credible Persons, given to the Person suspected of too much Familiarity with her, he refrain not from her company and communication with her. *Auth. Coll. 9.* By which Law also both Sexes are punished as guilty of Adultery; if a Woman, whose Husband is abroad in the Wars, or otherwise absent, marry again, before she hath certain intelligence of his death, either from the Commander under whom he served, or from the Governor of the place where he died, for without such certain intelligence, if she presume to marry again (how long soever her Husband is otherwise absent from her) both she and he who married her shall be punished as Adulterers; and if her former Husband after such her second Marriage return back again, she also shall return back again to her former Husband, if he will receive her, otherwise she shall live apart from them both, *Auth. Coll. ibid.* *Blackden* married one within age, and after disagreed, so that they might marry elsewhere; and the first Wife had Issue by other Husbands, and died; and *Blackden* was sued in the Ecclesiastical Court by an Informer, supposing he had married a Woman, living his other Wife, and

and *Blackden* there proves the disagreement, by which he had Sentence for him against the Informer, and yet he was taxed to give the Informer 20 Marks for Costs, which he refused to pay, and moved for a Prohibition, which was granted; For it was Injustice to allow Costs to one who had vexed him without cause, and which Sentence had been given against the Informer.

(8.) This Adultery or *Adulterium*, quasi [*ad alterum*] being (as aforesaid) an unlawful access *ad alterius thorum*, although it properly refers to one or both such as is or are in a Matrimonial State, yet by abuse of words it is also commonly understood of corrupting or Violating the Chastity of a Virgin or a Widow, as when we usually say, such or such natural things are adulterated, when by reason of some Artifice they are corrupted and become not truly natural; and such Wares and Merchandizes are adulterated, when there is some fraud in the case, and so Adultery is repugnant to the very Nature of Matrimony, which of Two makes One, when as the other of One makes Two: The punishment whereof was anciently by the Civil Law, Capital as to the Man: But by the latter Laws of the Authenticks, the Women are first whipt, then thrust into Monasteries; and by the Cannon Law it is Excommunication.

(9.) *Plato* made a Law, that whoever kill'd an Adulterer, should go unpunished. The Inhabitants of *Arabia Felix*, punished it with death. *Selucus*, otherwise *Nicator*, King of *Syria*, that succeeded *Alexander* in the Government of that part of the Empire, decreed that whoever was apprehended in Adultery should be execrated, or have his Eyes pluck'd out, which afterwards hapned to be impartially first executed on his own Son (8). And albeit according to the proper Construction of words there is a difference put between *Adulterium* and *Stuprum*, the former referring to persons married, the other to Widows or Virgins. *Modestinus* in *L. inter stuprum ff. de verb. Sig.* Yet by the *Julian Law* the word [Adultery] is used indifferently in reference to both: *Id. Modest. in L. Stuprum. Ad L. Jul. de Adult.* But to speak properly, they are not *Termini convertibiles*, for though all Adultery be Whoredom, yet every Whoredom is not Adultery; each of which have their respective punishments according to the Laws and Customs of the place where they are committed. *Grotius* out of *Lessius* affirms, that the Adulterer and Adulteress are not only obliged to indemnify the innocent party as to all charges of Allimentation of the unlawful begotten, but also to make good what damage the Legitimate Children

(10) *Alianus.*

Children may thereby suffer in their Inheritance, and whoever doth lessen the reputation of a Virgin either by force or insinuations, shall refund to her as much as she is thereby fallen in value upon the hopes or expectation of her Preferment in Marriage: But if by his Solicitations he hath obtained the use of her body under a promise of Marriage, he is obliged to marry her accordingly. *Grot. de jur. bel. lib. 2. cap. 17. §. & Less. lib. 11. cap. 19. Dub. 6.*

(10.) Although this Sin of Adultery, is properly and of right belonging to the Cognizance of the Ecclesiastical Jurisdiction, yet it will not be denied, but that as it is an offence against the peace of the Realm (for which reason some are of opinion that *Adultery* or *Baudry* is an offence Temporal as well as Spiritual) the Justices of the Peace may out of their Sessions require Surety for the good Behavior of such as offend therein, as also of such as by Common Fame are reputed Reforters to Houses suspected of maintaining Adultery or Incontinency, of such as keep such Houses, of lewd Women found in such Houses, of common Whoremongers and common Whores; (1.) And upon Information given to a Constable, that a Man and Woman be in Adultery or Fornication together (or that a Man or Woman of evil Fame or Report are gone to a suspected House in the night) the Officer may take company with him, and if he find them so, he may carry them to prison, or before a Justice of Peace to find Sureties for their good Behavior (1).

(1) 28 Eliz. by
Wray, Anderson
and Manwood,
Crom. 140.

(1) 13 H. 7. 10.
Br. Travers.
432.

(11.) The Punishment of Adultery, is diversified according to the Laws and Customs of several Nations respectively as forementioned, and the Penalty thereof with the Saxons of old in this Kingdom was called *Lairwise* or *Lecherwise*, and *Legergeldum*, from two Saxon words signifying it seems *concumbere* and *multa*.

(*) Bl. Nomo-
Lex. verb.
Lairwise.

(w) Vid. Fleta
l. 1. c. 47. to this
purpose, and
Co. Inst. par. 4.
fo. 206.

(x) St. West.
2 c. 34. Co. 1 p.
last, fo. 433.

(*) a Fine or Custom of punishing of Offenders of that kind: which Priviledg is said to have belonged anciently to the Lords of some Mannors, in reference to their Villains and Tenants. (w) And by Statute Law, as also by the Law of the Land, a Wife that elopes and parts from her Husband with an Adulterer, and refuses to be reconciled to him, loseth or forfeits her Dower or Jointure, (x) yea though she departed from him with his own consent, to which purpose remarkable is that Case of Sir *John de Camous*, Son of the Lord *Ralph Camous*, in the time of *Edw.* the first, who of his own voluntary Will gave and demised his own Wife *Margaret*, Daughter and Heir of *John de Gaidesden* unto Sir *William Pannel* Kt. and together with her gave, granted, released,

released, and Quit-claimed all her Goods and Chattels, &c. so that neither himself nor any other in his name, should ever after make any claim, or challenge any interest in the said *Margaret*, or to or in her Goods or Chattels, &c. Whereupon she demanding her Dower in part of the Lands of *S. John Camois* there happened a Suit at Law, wherein she was overthrown by Judgment given, *That she ought to have no Dower out of his Estate*, upon the Statute of *Westm. 2. Quia recessit a Marito suo in vita sua, & vixit ut Adultera cum prædicto Gulielmo, &c. (y).*

(12.) There are of the Church of *Rome*, who hold that Adultery in conjugato cum soluta is minus peccatum quam in conjugata cum soluto; the reason they give for it is, for that it is far more repugnant to the Law of Nature that one Woman should be joyned to two Men, than *e contra*, and suppose that Bigamy in the Patriarchs of old is an impregnable Fortification of that Reason; the Feminine Sex will give them but little Thanks for this Opinion: But leaving them to enjoy the one and the other, we hold that This, as to the Inquiry and Punishment thereof, is properly within the Ecclesiastical Cognizance, it being most consonant to Reason, that in what Jurisdiction Matrimonial Causes are controvertible, in the same should the Violation of Conjugal Rights be discussed; to which end, as well the Civil as Canon Law (though that especially) are furnish'd with great variety of Constitutions, to obviate all manner of circumstances relating to this Subject, *Pascb. 8 Car. B. R. Case Matingly* vers. *Martyn*. It was Resolved, That the Cognizance of all Fornications, Adulteries, and of Persons suspected to live in Adultery, doth belong to the Ecclesiastical Court. *Jones Rep.* So then *Adulterium* being quasi *Accessio ad alterius thorum*, is the violation of anothers Bed; whence it is required, that either both, or one of the Parties, be under the Matrimonial Vow; for that conjugal circumstance, either in the Male or Female, is as the *causa sine qua non*, that the luxurious Act falls under the notion of *Adultery*, in distinction from acts of the same kind under other circumstances. For the Law holds, That it may committed in a threefold manner, either *ex parte viri, vel feminae, vel utriusq;* always supposing that one or other are Matrimonializ'd, and both living. The Penalty of *Adultery* hath varied according to the Laws and Customs of several Nations, and of several Ages in the same Nation; as appears by what hath been said on this Subject; The punishment of this Epidemical Evil, the very Brutes and meer Animals have given us a president of, if credit may be given to such as have made report of the *Stork*, of which *Lessius* writes out of another Author, as being a Creature of strange abhorrency and revenge of Adultery, that by

(y) *Cambd. Brit. tit. Suppl. & Co. Inst. 2. p. fo. 475.*

Lessius de Just. & jur. lib. 4. cap. 3. De b. 10. nu. 71.

the very instinct of Nature the jealous Animal, impatient of vindicating his defiled Nest, summon'd others of the same Feather to advise in the Case, Testifying that in his own time a certain *Stork* being as it were convicted of Adultery *per olfactum masculi sui* or the smelling of her Male, he conven'd a Flock of other *Storks*, before whom he so prosecuted (*Nescio qualiter*, says the Author) the Indictment against the Female *Stork*, that she was first deplum'd, then torn in pieces by the rude Multitude of the other *Storks*, as if in a solemn Council they had all unanimously sentenc'd her to death as an Adulteress. If the Report seems improbable, yet the Moral is very applicable.

CHAP. XXXV.

Of Bastards and Bastardy.

1. *What Bastard signifies; the derivation of that word.*
2. *The difference between Bastard and Mulier; what Mulier signifies; and why so called.*
3. *Bastardy distinguish'd at the Common Law into Special and General Bastardy.*
4. *Presumptions of Law touching Bastardy, in case of the Husbands absence from his Wife.*
5. *Five Appellations of Bastards for distinction-sake at the Civil Law, with respect to the several qualities of the Persons of whom they were begotten.*
6. *The different Modes of prosecution of Bastardy in the Temporal and Ecclesiastical Courts.*
7. *Limitation of Time in reference to Birth and Bastardy by the Civil Law; The chaste Widow of Paris, whose Child born the 14th month after her Husbands death, was adjudged Legitimate.*
8. *Of a Child born before Marriage, or immediately after Marriage; or long after Marriage of a Woman whose Husband died without Bedding her, whether Bastard or not?*
9. *The legal computation of Time touching the Birth of a Child, whether Legitimate or not? And of such as are begotten after a Divorce.*
10. *The punishment of a Woman having a Bastard, that may be chargeable to the Parish.*
11. *How the same Person may in divers respects be both a Bastard or Nullius Filius, and yet a Son.*
12. *The Physicians report in Court, in a Case of Common Law, how long a Woman may go with Child.*
13. *The Bishops Certificate requisite in a Plea of Bastardy, in disability of a Plaintiff.*
14. *The Power of the Justices of the Peace, and of the Sessions, in reference to the reputed Fathers of Bastards.*
15. *In an Action for saying such an one had a Bastard, a Prohibition to the Ecclesiastical Court, because they admitted the Defendants Confession, but would not allow of his Justification.*
16. *Who are held as Bastardiz'd at the Common Law.*
17. *What a Mulier is at Common Law.*

18. Other Descriptions of Muliers and Bastards.
19. The difference between the Civil and Common Law in point of Muliers and Bastards.
20. What kind of Divorce shall Bastardize the Issue?
21. Different Resolutions touching Bastardy.
22. A Man is Divorc'd Causa Frigiditatis, Marries again, hath Issue by the second Wife, the first Living, Quest. Whether that Issue be a Bastard?
23. A Case of Remark touching this Subject adjud. in Ireland.

(1.) **B**A S T A R D, *Bastardus*, *Nothus*, *Spurius*, *Filius Naturalis*, *Filius Populi*, *Filius nullius*, *Incestuosus*—*Adulterinus*, *illegitimo coitu Progenitus*. Bastard is a

(a) *Cassana de Consect. Burgund. p. 1116.*

(b) Terms of Law, verb. Bastard. St. 20 H. 3. 9.

Mulier according to *ulpianus* is a defiled Woman.

(c) *Ibid.* verb. Mulier & Lt. Temures, lib. 3. cap. 6.

Of Descents. (d) St. 9 H. 6. c. 11. and Smith. de Rep. Angl. lib. 3. cap. 6.

(f) *Glanv. l. 7. c. 1. & Britt. c. 7. & Skene de verb. sig. verb. Mulieratus filius.*

Vld. Co. on Litt. fo. 170. b. & 243. b.

(f) *Bract. lib. 5. cap. 19.*

(g) *Kitchin fo. 64.*

(h) *d. Stat. 9 H. 6. 12.*

French word, *Bastard* British; yet some are of opinion that the word [Bastard] hath its derivation from two German words [Boesart] that is, *Degeneris ingenij. Q. an non e Græc. Bassaris, i. e. Meretrix vel Concubina.* Bastard and *Filius Naturalis* are both one (a). Bastard is that Male or Female that is begotten and born of any Woman not Married, so that the Childs Father is not known by order and judgment of Law, for which reason he is called *Filius Populi* (b).

(2.) Bastard and Mulier are opposed each to other at the Common Law, Otherwise at the Canon Law. For at the Common Law by Mulier is meant and understood one that is lawfully begotten and born, and therefore where they are compared together we shall find at that Law this addition to them *Bastard eigne* or Elder, and Mulier *puisse* or Younger; and by the Common Law he or she that is born before Marriage celebrated between the Father and Mother, is called a Bastard; and by that Law, a Child begotten and born of a Woman out of Marriage, by one who after Marrieth her, is said to be not a Mulier but a Bastard (c). This word [Mulier] seems to be a word corrupt from *Melior*, or the French [Melieur] signifying at Common Law the lawful Issue, prefer'd before an Elder Brother born out of Marriage (d). But by *Glanville* such Lawful Issue seems rather Mulier than Melior, because begotten a Muliere, and not ex Concubina; for he calls such issue, *Filius Mulieratus*, opposing them to Bastards (e) *Quia Mulieris appellatione uxor continetur, l. Mulieres 13. & ibid. gloss. De verb. sign.*

(3.) Bastardy [Bastardia] at the Common Law signifieth a defect of Lawful Birth objected to one begotten out of Marriage (f), which Law doth distinguish Bastardy into Special and General (g). The later whereof being only a Certificate (h) from the Bishop of the Diocess to the King's Justices, after just-enquiry made whether

ther the Party enquir'd of, be *Bastard* or not, upon some question of Inheritance; and the former being only a Suit commenced at Common Law against him that calls another *Bastard*; This being called *Bastardy special*, because *Bastardy* is the Principal and special matter in Trial: As the other is called *Bastardy General*, because Inheritance is there the chief thing under debate and in contest. By both these significations, *Bastardy* at the Common Law seems to be taken only for an Examination of Trial, whether a Mans Birth be illegitimate, and so does but rather imply what it is not, then express what it is (*i*). Which (according to a better Definition) is an unlawful state of Birth, disabling the Party to succeed in Inheritance.

(4.) It appears by what hath been said, that a *Bastard* is one that is born of any Woman, so as the Father be not known according to the order of Law (*k*). So that if any Woman hath a Child before her Marriage, it is a *Bastard*: And though the Father thereof after marry the Mother, yet in the Judgment of the Common Law it is still a *Bastard*, but at the Canon Law it is otherwise as aforesaid (*l*). If one marry *infra gradus Maritagij* and hath thereby Issue. *Qu.* whether it be a *Bastard* or *Adulter* in case Divorce doth after thereupon ensue (*m*). If there be Issue by a second Husband or Wife, the former then living, such Issue is a *Bastard* (*n*). A Woman Eloping from her Husband, and living in Avoutry (her Husband being beyond Sea that he cannot come at her) having Issue in this time; this Issue seems to be a *Bastard*: But by the Common Law, if the Husband be *infra quatuor maria* (he) within the jurisdiction of the King of *England*, and his Wife have Issue in his absence, No proof is Admissable to prove the Child a *Bastard*, unless there be an apparent impossibility of Procreation in the Husband; in which case such Issue, albeit born within Marriage, is a *Bastard* (*o*). And by the Civil Law, if the Husband be so long absent from his Wife, or by no possibility of Nature the Child can be his, or the Adulterer and Adulterers be so known to keep company together, as that by just account of time, it cannot fall out to be any other mans Child but the Adulterers himself, it is accounted to be a *Bastard*: And yet in these very cases within this Realm, unless the Husband be all the time of the impossibility of Procreation (as aforesaid) beyond the Seas, the Rule of Law will hold true, *Pater is est quem Nuptia demonstrant* (*p*).

Note in Debt upon an Obligation by Cook Chief Justice; And so was the Opinion of the Civilians, That a Disagreement to the Marriage had under the Age of Consent, at the Age it ought to be published in Court; otherwise the Issue may be *Bastarded*. For a Disagreement in Writing is not a sufficient Disagreement for a good Proof (*q*).

(5.) The

(i) Vld. Bro.
tit. Bastardy.
Nu. 29.

(k) Co. 8. 102.
6. 65. sup. Litt.
244.

(l) St. 20 H. 3.
c. 9. 1 H. 6.
31. Co. on Litt.
244.

(m) 46 Ed. 4.
29. & Bro.
Sect. 43. &
93 E. 3. 32.
(n) 39 Ed. 3.
14. 7 H. 4. 9.
18 Ed. 4. 26.

(o) 43 E. 3. 19.
7 H. 4. 9.
7 H. 5. 9.
44 E. 3. 10.
1 H. 6. 7. 19 H.
6. 17. Co. on
Litt. 244.

(p) Ridl. view
of Sec. par. 3.
cap. 1. Sect. 2.

(q) Sir Walter
Sands vers.
Adam and Cud-
win, post. dtd.
case in Noy's
Rep.

(5.) The Law hath given several Appellations for the distinction of Bastards according to the different conditions of the persons of whom they were begotten; As when they were begotten by persons of a single and unmarried Estate, and of such as were kept as Concubins, the *Civil Law* called them *Filij Naturales*; if begotten of single Women, not design'd for Concubins, for satisfaction of present Lust, then they were called *Spurij*; if begotten of such as the Law styles *Scorrs*, or common Harlots by publick Profession, then they were called *Manzeres*; if begotten of Married Women, then they were called *Nobis*; if begotten between Ascendents and Descendents, or between Collaterals contrary to the Divine Prohibition, then they are called *Incestuous*.

(6.) *Bastardy* stains the Blood: that the Bastard can challenge neither Honour nor Arms; and so disables him, that he cannot pretend to any succession to inheritance. The Temporal and the Ecclesiastical Laws with us do not differ as to matter of *Bastardy*, but something as to the prosecution thereof; The Ecclesiastical Law brings it two ways to Judgment, *Incidentally* and *Principally*; the Common Law makes two sorts thereof, *General* and *Special*. *Incidentally* at the Ecclesiastical Law, when it is pleaded in Bar to a claim of something in right of Nativity: *Principally*, when by reason of some slanderous and reproachful Speeches, it is brought before the Court as the principal matter in Judgment to be alledged and proved, that thereupon Sentence may be pronounced accordingly by the Ecclesiastical Judge, *Ad Curiam enim Regiam non pertinet agnoscere de Bastardia* (r). *General Bastardy* at Common Law, is so called because it is in gross objected in Bar against a Man to disappoint him in the principal matter of his Suit. Which, because it is of Ecclesiastical Cognizance, if sent by the Kings Writ to the Ordinary, to enquire whether the Party charged with Bastardy were born in, or out of Lawful Matrimony; And as the Ordinary finds the truth of the matter upon due examinations, so he pronounceth accordingly in his Consistory, whereof he returns Certificate to the Temporal Courts (s). *Special Bastardy* at the Common Law, seems to be only that, where the Matrimony is confessed, but the Priority or Posteriority of the Nativity of him, whose Birth is in question, is controverted (t).

General Bastardy ought to be Tried by the Bishop, and not by the County (u). But Bastardy in this sense cannot be tried by the Ordinary otherwise than by virtue of the King's Writ, on some Suit depending in the Temporal Court (m). When Issue is joyn'd on Bastardy, before it be awarded to the Ordinary to Try it, Proclamation thereof is made in the same Court, and after Issue it is certified in *Chancery*, where Proclamation is made once a Month

and lib (1)
agitated in
2. 2. 22

2. 2. 22 (1)
and lib (1)

2. 2. 22 (1)
and lib (1)

2. 2. 22 (1)
and lib (1)

2. 2. 22 (1)
and lib (1)

2. 2. 22 (1)
and lib (1)

(r) Ridly, ubi
supra.

(s) Ibid.

(m) D. 1. Ba-
stardy 55.
39 E. 3. 31.
h. per Thorp.

Month for three Months, and then the Lord Chancellor certifies it to the Court where the Plea is depending; and after it is Proclaimed again in the same Court, that all such whom the said Plea concerns, may appear and make their Allegations before the Ordinary (n); whose Certificate of Bastardy is nothing to the purpose, unless it come in by Process at the Suit of the Parties (o). And this Bastardy ought to be certified under the Seal of the Ordinary; for it is not sufficient to certify it under the Seal of the Commissary (p). And although the Defendant be certified a Bastard by the Ordinary, yet the Certificate shall lose its force, if the Plaintiff be afterwards Nonsuit, for then the Certificate is not of Record (q).

In the Case of *Elborough* against *Allen*, it was said by *Crook*, that for calling one Bastard generally, there is not any sufficient Ground of Action at the Common Law, but if there be any special Loss thereby, it shall be a good ground of Action at the Common Law; as if a Man be upon Marriage, or in treaty for the sale of Land, whereby his Title is disparaged. *Doderidge* Justice said, That the word Bastard is generally of another Jurisdiction, and belongs to the Ecclesiastical Court to determine what shall be Bastardy, and there Judgment is given for the damage, which the party had in his birth, and for that their Entry is *quia lasti est natalitium*. And in this Case the Chief Justice said, that generally to say *J. S.* is a Bastard, *J. S.* hath not cause of Action given him thereby; but if there be a Temporal cause aver'd, the Common Law may proceed therein; for though Originally Bastardy be of the Ecclesiastical Jurisdiction, not Triable at the Common Law, and therefore as in its general nature it is of the Spiritual Jurisdiction; so being by its generality no ground of Action at the Common Law, yet if one be to sue for a Childs part, or sue for the Administration of his Fathers Goods, and this be set forth in the Declaration, it will maintain an Action at Common Law. *Doderidge* Justice said; That to say generally that one called him Bastard, is not ground of Action, if he doth not shew some special Loss thereby, as when a Woman brings her Action, and says that she was in Treaty of Marriage, and that the Defendant called her Whore, this will not maintain an Action unless she say withall, that by reason of these words she lost her Preferment; but *Chamberlain* Justice said, to call a Woman Whore is at this day a sufficient cause of Action for her, for that it is punishable by the Statute; He also further said, that if a man Libel in the Ecclesiastical Court, that he hath Lands by descent, and that *J. S.* call'd him Bastard, they may not proceed there; or if they do, a Prohibition lies. He further said, that for calling a Man Bastard generally, without special Loss alledged, Action shall be maintained, and cited a Case in 6 *Eliz.* *Dyer*. Where a Man recovered great

(n) 10 H. 6.

cap. 11.

(o) 7 H. 6. 32. b.

(p) 20 H. 6. 1.

(q) 18 E. 3. 34.

Mich. 20 Jac.
B.R. *Elborough*
versus *Allen*.
Roll. Rep.

great Damages, for that the Defendant had said that his Father was a *Bastard*; and cited also one *Nelson* and *Stokes* Case in 5 *Jac.* where the Plaintiff did not alledge any special cause of Action, and yet recovered.

(7.) By the Civil Law such as were born in the beginning of the eleventh Month next after the decease of their Mothers Husband were to be accounted legitimate, but such as were born in the end thereof, were to be accounted Bastards, *Auth. Coll. 4.* yet the Gloss there relates to a matter of Fact contrary to this Law, and gives us an instance of a Widow in *Paris*, who was delivered of a Child the fourteenth Month after her Husbands death, yet the good repute of this Womans continency prevailed so much against the Letter of the Law, that the Court Judg'd the causes of Child-birth to be sometimes extraordinary, the Woman to be Chast, and the Child Legitimate. *Hoc tamen in exemplum trahi facile non oportet*, as the Gloss there concludes.

(8.) By the Common Law, if a Child be born but an hour after the Solemnization of Marriage, it shall be the Husbands, though it were begotten by another Man, who was not the Mothers Husband, and may be the Heir of him who Married the Mother but a Day before the Birth of such a Child: (u), for in that Case he is not reputed a *Bastard*, who cannot inherit Land as Heir to his Father, nor can any person inherit Land as Heir to him, but one who is Heir of his Body (x). Otherwise it is in case the Child were begotten by him who after the Birth of the Child doth Marry his Mother; For in that Case notwithstanding such Marriage subsequent to the Birth, the Child is reputed a Bastard in the Judgment of the Common Law, as being born out of Wedlock, though according to the Ecclesiastical Law the Child in that case is reputed as Legitimate (y). But if one Marry a Woman, and die before Night, without ever bedding her, and she after happen to have a Child, within possibility of conception in respect of time computable from such Marriage, it seems it shall be accounted his Child, and Legitimate (z).

(9.) If a Child be born within the tenth Month (computing thirty days to a Month) next after a Mans death, it shall be reputed his Child as a *Mulier*; but the most natural time is nine Months and ten days (computing twenty eight days to the Month) which is forty Weeks; or any day in the tenth Month may be natural enough (a). Also the Children begotten under a second Marriage after a Lawful Divorce from the former, are Legitimate, and not Bastards (b). And the Child wherewith the Mother is visibly big when she taketh a second Husband, shall be reputed the Child of the former Husband, though born after Marriage with the

(u) Term of
Law. Verb.
Bastardy.

(x) Littl. Sect.
401. Fitz. B.
20.

(y) St. 20 H. 3.
9. & 1 H. 6. 3.
Co. on Lit.
244.

*Quia subsequens
Matrimonium
tollit culpam
præcedentem.*

(z) Vid. Engl.
Lawyer 117.

(a) Co. sup.
Litt. 123.
Allop's Case.
M. 17 Jac. B. R.
(b) Co. 4. 29.

the second. Otherwise, if at her second Marriage she were so privily with Child as that it could not be discerned; understand it with this limitation, if by possibility of nature it may be so (c). And if a Widow take another Husband, within ten days next after the death of her former, and be delivered of her Child eleven days before or after forty Weeks from the death of the said former Husband, it shall be reputed the Child not of the former, but of the latter Husband (d). And in one *Thecker and Duncomb's Case* it was Adjudged that a Woman may have a Child in 38 Weeks, and that by cold and hard usage, she may go with Child above forty Weeks; which was mention'd by the Court in the Case of one *Owen* against *Jevon* in an Action of the Case for saying *This is the Whore that my Man C. begat a Bastard on*; and upon a Verdict for the Plaintiff it was moved in arrest of Judgment, that the words are not Actionable, because there is no special loss or damage alledged by the Plaintiff; and that in one *Lighfoot's Case* against *Pigot* it had been Ruled that an Action lies not for saying a Woman had a Bastard; but it being Argued on the other side, that the words are Actionable, because if they were true, the party of whom they are spoken is punishable by the Statute of 7 Jac. with corporal punishment. Judgment was given for the Plaintiff, *Nisi* (e).

(10.) The punishment of a Woman that hath a Bastard, that may be chargeable to the Parish, is the House of Correction for one year by the Statute (f).

(11.) Although in the Judgment of the Common Law a Bastard be reputed *quasi nullius Filius* (g), inasmuch that, if being seized of Lands in his own right, he die without Issue of his Body, they may escheat; yet even by that Law the Bastard in respect of his Mother is said to be a Son (h). But in respect of the Father he is said to be *nullius Filius*, and therefore in the Case of *Ralph Howard* and the Lady *Anne Powes* his Wife in a Writ of Partition, it was held, that if the Mother dispose of all her Lands holden in Knights Service, to her Bastard Daughter by conveyance in her life time, that the same is out of the Statute of 32 H. 8. because she is but a meer stranger to the Father, because *nullius Filia*; and the said Statute speaks of lawful generation. And in the 39 Ed. 3. 42. in a *Præcipe*, where a Bastard was named *Filius J.S.* the Writ for that reason did abate (i). For the same reason also it is, that in a conveyance by a Father to his Bastard Son, natural affection is not a sufficient consideration; for that he is a Stranger in Law although he be a Son in Nature (k). And yet it seems if a Grant be made to a Bastard by the Surname of him who is supposed to beget him, it is good, if he be known by such Name, and yet in truth he is *nullius Filius*. And if Husband and Wife Divorced *causa Præcon-*

(c) 21 E. 3. 39.

(d) 18 E. 1.
Com. Bndf. Case
R. 13. B.R.

(e) Trin. &
Paic. 1641. rot.
211. B.R. *Owen*
vers. *Jevon*.
Styl. Rep.

(f) 77 Jac. c. 4.
(g) Littl. 41. b.
(h) Vid. 11 H.
4. 75.

(i) Vid. 13 El.
Dyer 296. and
14 El. Dyer.
313. Hugh. Abr.
verb. Bastard.
(k) Mich. 23
El. Dyer. 374.
no. fil's Case.

(l) Co. 6 par.
65. In Sr. Moile
Finches Case.
(m) Mich. 28
El. Coke pa. 4.
29 Banting and
Loringwell's C.;
(n) Co. 7. par.
42. 43. Kenns C.

(o) Mich. 17
Jac. B.R. Allop
and Bowtell's
Case. Cr. 2. par.
321. Godb.
281. the same
Case.
Mich. Jac. B.R.

Braff. lib. 5. f.
417. b.

tractus, the Issue hath lost his Surname, for *Cognomen Majorum est ex sanguine tractum*; and the issue now is Bastard and *nullius Filius*: yet because he had once a lawful Surname, it is a good ground of reputation, to make him a reputed Son, which is a good Name of purchase (l). And it hath been resolved that a Child begotten by a second Husband (living the former) of a Woman divorced from the former *causa Pracontractus*, is legitimate and no Bastard (m); But in another Case, that a Child begotten after Marriage solemniz'd *infra annos nobiles*, and for that cause after divorced, is illegitimate and a Bastard (n).

(12.) A. takes B. to Wife and dies, B. after forty Weeks and ten Days is delivered of a Daughter. The Question is, whether the Daughter shall be Heir to her Father, or a Bastard? The Affirmative prevails, and such a Child may be lawful Daughter and Heir to her Father; for a *Post-natus*, that is born after the forty Weeks, may as well be an Heir as an *Ante-natus* that is born at the end of seven Months; And a Child may be Legitimate, although it be born the last day of the tenth Month after the conception thereof, computing the Months *per menses solares & non lunares*; according to the report given upon Oath by the learned Physicians in *Allop's Case* (o). If a Man hath Issue born by his Wife forty Weeks and eight Days after his death, as if he die the three and twentieth of *March*, and the Issue is born the ninth of *January* next following, that Issue shall be held Legitimate, for it may be Legitimate by Nature, and it seems the Common Law doth not limit any certain time for Legitimate Infants to be born. (p) Upon evidence at the Bar which concern'd the Heir of one *Andrews*, it was resolved by the Court, that *Dr. Paddy* and *Dr. Momford*, Physicians, should (being first sworn) in that case inform the Court upon their Oaths, whether according to Nature such Issue may be Legitimate, and they said that the exact time of the Birth of an Infant is 280 Days from the conception, *viz.* nine Months and ten Days after conception, accounting it by the *Solar Months*, *viz.* 30 days to each Month; but it is Natural also if he be born any time of 10 Months, *viz.* in 40 Weeks, for by such account 10 Months and 40 Weeks are all one, but by accident an Infant may be born after the 40 Weeks, or before: *Si partus nascatur post mortem Patri (qui dicitur Postumus) per tantum tempus, quod non sit verisimile quod possit esse defuncti filius, & hoc probato, talis dici poterit Bastardus.*

(13.) It is agreed on all hands that *Bastardy* is an Ecclesiastical Cause, and of Ecclesiastical Cognizance; and therefore if *Bastardy* be pleaded in disability of a Plaintiff, the same shall be Tried by the Certificate of the Bishop, whether it be in a Real Action relating to Inheritance, or Personal relating to Slander, or otherwise

where

where, Action on the Case, will lie; But if it be pleaded, that the Plaintiff was born at such a place before the Marriage solemnized, and so he is a Bastard: This the Common Law calls a Special Bastardy, and shall be tried by a Jury at the Common Law, where the Birth is alledged; (r) So in the Duke of Suffolk's Case of Partition, where special Bastardy was pleaded, and Issue thereupon taken, the Trial was awarded to be by a Jury of London. (s) And where in an Action upon the Case brought for calling one Bastard, the Defendant justified that he was a Bastard; it was awarded, that it should be Tried by the Country, and not by the Ordinary.

(r) Which seems something *Paradoxical*, that if Bastardy be pleaded in *Disability* of a Plaintiff, then it shall be tried by the Bishops Certificate; but if it be pleaded, that the Plaintiff was born in such a place before the Marriage, then by a Jury: The former whereof is said to be a *general Bastardy*; the other a *special Bastardy*; whereas in truth they seem both only to differ in this, that the former seems to be a general relating to the Plaintiffs condition in respect of his *Disability*; the other seems to be a *special* relating to the circumstances of Place and Time of his *Nativity*, but both referring to his Bastardy.

(14.) If a man, that is ordered by two Justices of the Peace to keep a Bastard-Child (he being according to the said Order the reputed Father) shall appeal from the said Order to the next Quarter Sessions according to the Statute of 18 *Elix.* and being there discharged, and the said Order repealed, shall yet afterwards at another Quarter Sessions of the Peace upon re-examination of the matter be ordered according to the first Order; in that case it hath been held by the Court, that the second Sessions had no power to alter the Discharge made by the former Sessions. (u) And in another Case it hath been resolved, that before the Statute of 3 *Car. c. 4.* the Justices at the Sessions had no Authority to intermeddle in the Case of Bastardy, till the two next Justices according to the Statute of 18. *Elix.* had made an order therein; As also that by the Statute of 3 *Car.* the Justices of their several Limits are to make an Order in Case of Bastardy.

(15.) C. commenced an Action in the Spiritual Court against W. for saying that he had a Bastard W. the Defendant alledged in the said Court, that the Plaintiff was adjudged the reputed Father of a Bastard by two Justices of the Peace according to the Statute whereupon he spake the words. The Spiritual Court accepted of his Confession, but would not allow of his Justification; whereupon he prayed a Prohibition, and it was granted (y). It is not denied, but that if the Spiritual Court try a thing that is of Temporal Cognizance, a Prohibition may lie, although all the Cause were originally Spiritual, as was resolved

(r) Vid. Co. 8.
par. Case of the
Abbot of Stra-
ta Marcella.

(s) Vid. 7 E. 6.
Dyer 9.

(t) Trin. 14
Jac. Hob. Rep.

(u) Trin. 9 Car.
B. R. 248. Cro.
1. par. Pidgeons
Case. Ibid. 255.
acc.

(x) Pasch. 19
Car. B. R. Slates
Case. Cro. 1.
par. 337.

(y) Pasch. 17
Jac. B. R. Webb
and Cooks Case
Cro. 2. par. 535,
and 625.

(r.) Cook 7.
par 44. acc.
Ken's Case.

(a) Mich. 28
El. Cook. 4. pa.
29. *Banting &
Lepingwel's Ca.*
Hugh. Abr.
verb. Bastard.
Caf. 6.

(b) 18 H. 6. 31.
18 E. 4. 30. b.
Co. 7. Kenn. 44.
(c) 38. Aff. 24.
Adjdg.

(d) 18 H. 6.
34. b.

(e) 18 H. 6. 32.
39 E. 3. 31. b.

(f) 47 E. 3. l.
14. b. 11 H. 4. 84
18 E. 4. 30.

39 E. 3. 31. b.
38 Aff. 24.

(g) Trin. 3 Jac.
B. R. inter *Stile
& wife*.

(h) Hil. 14 Jac.
in Camera
Stellata inter
Done & Egerton
Plaintiffs, and
two *Hintons*
and *Starky*
Defendants, so
held by the
Chancellor, &
Montague; but
Hobart & con-
tra.

(i) 40 E. 3. 16.
b. 21 E. 3. 39.

39 E. 3. 31. 31.
Aff. pl. 10. 2 E.
3 29. per *Herle*
and *Tond.*

(k) 44 E. 3.
12. b. 45 E. 3.
28.

(l) 1 H. 6. 3.
contra. 44 Ed.

3. 12. b. 45 E.
3. 28. contra. 18 H. 6. 31. b.

3. 43 E. 3. 18. b. 20. 18 E. 4. 30. Hil. 18 Jac. ibid. Cam. Stellat. (p) 40 E. 3. 20. Aff. 8. (q) 18 H. 6. 17.

in *Kenn's Case* (x.); in which Case it was likewise resolved, that where the Cause is Spiritual, there the Spiritual Court hath Jurisdiction; and in the Case between *Banting* and *Lepingwel* it was resolved, that the Judges of the Common Law ought (that is the word in the Report) to give Faith and Credit to the Proceedings of the Spiritual Court, albeit it be against the Reason of their Law (a).

(16.) If a man having a Wife, take another Wife, and hath Issue by her, living the former Wife, such issue is a Bastard (b), for the second Marriage is void (c). If a man marry one within the Degrees prohibited, the Issue between them is not (by the Common Law) a Bastard, until there be a Divorce, for by that Law the Marriage is not till then void (d). (So it is although the Brother Marry the Sister) (e). If a Man hath issue by A. and after Marries her, yet the Issue is a Bastard at the Common Law (f). An Ideot may consent to Marriage (by the Common Law) though he were an Ideot from his Birth, and his Issue by that Law is Legitimate (g). If the Husband be castrated, so that it is apparent that he cannot by any possibility beget any Issue, and his Wife have Issue divers years after, it shall be a Bastard, although it be begotten under Marriage, for that it is apparent that it could not be Legitimate (h).

(17.) By the Law of the Land a Man cannot be a Bastard, who is born after the Espousals, unless there be some special matter in the Case (i). If a Woman be big with Child by A. and after A. Marry her, and the Issue is born within the Espousals; in this Case by the Common Law the Issue is *Mulier*, and not *Bastard* (k). So if a Woman be big with Child by one Man, and afterwards another Marries her, and after the Issue is born, such Issue is a *Mulier*, for that he is born under Espousals, and cannot be held the Issue of him by whom she was with Child, because that cannot be certainly known (l); and so it is although the Issue were born within three days after Marriage (m).

(18.) If a Woman Covert hath Issue in *Avoutry*, yet if the Husband be able to get a Child, and be *infra quatuor maria*, the Issue is no Bastard (n). If a Woman Elope and live in *Avoutry* with another Man, during which, Issue is born in *Avoutry*, yet it is a *Mulier* by the Common Law (o). But then the Husband must be *infra quatuor maria*, so as that by intendment he might come to his Wife, otherwise the Issue is a Bastard (p). But if a Woman hath Issue, her Husband being beyond Sea for seven years together before the Issue was born, such Issue is a Bastard at the Common Law (q). If a Feme

(w) 18 E. 4. 3. (x) Hil. 14 Jac. Cam. Stellat. ubi supra. (y) 1 H. 6. 3. 43 E. 3. 18. b. 20. 18 E. 4. 30. Hil. 18 Jac. ibid. Cam. Stellat. (p) 40 E. 3. 20. Aff. 8. (q) 18 H. 6. 17.

Covert hath Issue, her Husband being beyond Sea for six years before the Issue is born, it is a Bastard at the Common Law (*). If a (†) 18 H.6.34.
Woman hath Issue, her Husband being within fourteen years of age, the Issue is a Bastard at the Common Law. (*) *quere.*

(19.) A. hath Issue by B. and after they intermarry, yet the Issue is a Bastard by the Common Law; (s) but it is a *Mulier* by the Civil Law (o). If the Parents be Divorced *causa consanguinitatis*, they being ignorant thereof at their Marriage, the Issues they had before, are Bastards at the Common Law, and *Muliers* by the Civil Law (p). If a Man hath Issue by a Woman, and after Marry the same Woman, the Issue by the Common Law is Bastard, and *Mulier* by the Ecclesiastical Law (q): Likewise if a Man espouse a Woman big with Child by another Man, and within three days after she is delivered of a Child, by the Common Law this is a *Mulier*, and by the Ecclesiastical Law a Bastard (r). If a Woman Elope and hath Issue in Adultery, such Issue is a *Mulier* at the Common Law, and a Bastard by the Ecclesiastical Law (s); yet if the Woman continue in Adultery, and hath Issue, such Issue are Bastards even by the Common Law (t). But by the Law of the Land a Man may not be reputed a Bastard who is born after Espousals, unless there be some special matter in the Case as aforesaid (u). But if a Man who hath a Wife, doth during her life take another Wife, and hath Issue by her, such Issue are Bastards by both the Laws, for the second Marriage is void (x).

(20.) A Divorce *causa precontractus* doth Bastardize the Issue, (y) so also doth a Divorce *causa Consanguinitatis* (z); likewise if the Divorce be *causa Affinitatis*, it doth Bastardize the Issue; (a) and the Law is the same, in case the Divorce be *causa Frigiditatis* (b). A Man hath Issue a Bastard, and after Marries the same Woman, and hath Issue by her divers Sons; and then deviseth all his Goods to his Children, Q. whether the Bastard shall take by the devise? But if the Mother of the Bastard make such a devise, it is clear the Bastard shall take, because he is known to be the Child of the Mother (c).

(21.) B. contracted himself to A. afterwards A. was Married to F. and cohabited with him, whereupon B. sued A. in the Court of Audience, and proved the contract, and Sentence was there pronounced, that she should Marry the said B. and cohabit with him, which she did, and they had Issue C.B. and the Father died: It was argued by the *Civilians*, that the Marriage betwixt B. and A. was void, and that C.B. was a Bastard: But it was resolved by the *Justices*, that C. the Issue was Legitimate and no Bastard (d).

(22.) The Case was wherein a Man was Divorced *causa Frigiditatis* and afterwards took another Wife and had Issue; it was Argued by the *Civilians*, and also by the *Justices*, whether the Issue

(*) 1 H.6.3.b.

(s) 47 E.3. 14.

b. 11 H.6.34.

(o) 11 H.4. 84.

Bracton l. 5. fol.

416, 417.

(p) 18 E.4.30.

(q) Ibid.

1 M. 6. 3.

(r) 18 E.4. 30.

43 E. 3. 19. b.

20.

(t) 40 E.3. 16.

(u) Ibid.

(x) 18 E.4.30.

b.

Co. 7. *Ken.* 44.

18 H.5.31.

(y) 47 E. 3. pl.

78. 18 H.6.34.

(z) 47 E.3.78.

cont. 29 E. 1.

Bastardy 21.

cur.

(a) Ib. 47 E.3.

(b) Ib. 42 E.3.

78.

(c) *Morris* Rep.

(d) Mich. 26

and 27 Eliz.

Banting's Case.

Morris's Rep.

were Bastard or not, it was adjudged that the Issue by the second Wife was not a Bastard; For that by the Divorce the Marriage was dissolved a *vinculo Matrimonij*, and each of them might Marry again: But admit that the second Marriage was voidable, yet it stands good till it be dissolved, and so by consequence the Issue born during the Coverture is a lawful Issue (b).

(b) Mich. 28

Eliz in Cur.

Wardor. Morris

and Wibbers

Cafe. Moor's

Rep. Mich. 9

Jac. Enle Court

de Castle-cham-

ber en Ireland.

Davis Rep.

(23.) Upon an Information in the *Castle-Chamber in Ireland* against the Bishop of K. and C.B. and others, that by Practice and Combination, and by undue course of proceedings they endeavoured to prove the said C.B. (who was ever before reputed a Bastard) to be the legitimate or lawful Son and Heir of G. B. Esq; to the dishonour and defamation of E.B. who was the sole Daughter and Heir of the said G. B. And upon Oyer of this Cause the Case appeared to be this, *viz.* About twenty six years before the exhibiting of this Bill, the said G. B. had Issue the said C.B. on the Body of one J. D. who during the life of G. B. was not reputed his Wife, but his Concubine; and the said C. B. for all the time aforesaid, was only accounted the natural Son of G. B. but not for legitimate. Afterwards, *viz.* sixteen years after the Birth of G. B. (his Mother being then living) G.B. took to Wife a Lady of good Estate and Reputation, with the assent of her Friends, by whom he had Issue the said E. B. and died. After the death of the said G.B. the said C.B. his reputed Son (nor his Mother who was yet living) said nothing by the space of nine years, but at last they practiced and combined with the said Bishop of K. being of their Kin, and with many others to prove the legitimation of the said C. B. by an irregular and undue course, to the intent to Bastardize and disinherit the said E. B. according to which practice and combination, the Bishop without any Suit commenced or moved in any of the Kings Temporal Courts, or any Writ directed to him, to certify Bastardy or Legitimation in that Case, and (which is more) without any Libel exhibited in his Ecclesiastical Court, touching that matter, of his own will and pleasure, privately, and not *convocatis convocandis*, nine years after the death of the said G. B. took the depositions of many witnesses to prove that the said G. B. twenty nine years before had lawfully married and took to Wife the said J. D. Mother of the said C. B. and that the said C. B. was the legitimate and lawful Son and Heir of the said G. B. And these depositions so taken, the said Bishop caused to be engross'd and reduced into the form of a solemn Act; and having put his Signature and Seal to that Instrument, delivered the same to C. B. who published it; and under colour of that Instrument or Act declared himself to be the Son and lawful Heir of the said G. B. &c. And for this practice and misdemeanour the said

said Bishop of K. and others were censured; and thereupon these points were Resolved (1.) That although all Matrimonial causes have of a long time been determinable in the Ecclesiastical Courts, and are now properly within the Jurisdiction and Cognizance of the Clergy, yet *ab initio non fuit sic*. For causes of Matrimony as well as cause Testamentary were heretofore civil. Causes and appertaining to the Civil Magistrate, as is well known to all Civilans, until the Christian Emperors and Kings, as an honour to the Prelates of the Clergy, did grant and allow unto them the Cognizance and Jurisdiction of these Cases. And therefore the King of England, who is, and of right ever was the Fountain of all Justice and Jurisdiction in all Causes, as well Ecclesiastical as Civil, within his own Dominions, although that he allow the Prelates of the Church to exercise their several Jurisdictions in those Causes which properly appertain to their Cognizance, yet by the Rules of the Common Law, he hath a superintendency over their Proceedings, with power of direction how they shall proceed; and of restraint and correction, if they do not proceed duly in some cases; as is evident by the Writs of several natures directed to Bishops, by which the King commands them to certify *Bastardy*, *Excommunication*, *Profession*, *Accouplement en Loyal Matrimony*, *De admit. Clericis*, *de Cautione admittenda*, &c. as also by the Writs of *Prohibition*, *Consultation*, and *Attachment* upon a *Prohibition*. (2.) It was Resolved, that the Question of Bastardy or Legitimacy ought to be first moved in the Kings Temporal Court, and thereon Issue ought to be joyued there; and then it ought to be transmitted by the Kings Writ to the Ecclesiastical Court, to be examined and tried there; and thereupon the Bishop shall make his Certificate to the King's Court; to which Certificate being made in due form of Law such credit is given, that the whole World shall be bound and stopt thereby. But on the other side, if any Suit to prove Bastardy or Legitimacy be first commenced in the Ecclesiastical Court, before any Question of that matter hath been moved in the King's Temporal Court, in that Case Prohibition lies to restrain such Suit. To this purpose was *Corbet's Case* cited, 22 Ed. 4. *Fitz. Consultation* 6. Sir Robert Corbet had Issue two Sons, Robert and Roger, Robert the eldest Son being within the Age of fourteen years, took to Wife *Matild*, with whom he cohabited till he came of full Age, and they publickly known and reputed for Husband Wife; yet afterwards Robert the eldest Son doth dismiss the said *Matild*, and she living, doth Marry one *Lettice*, and having Issue a Son by the said *Lettice*, dies; after his death *Lettice* doth publish and declare openly, that she is the lawful Wife of Robert, and that his Son was a *Mulier* and legitimate. Where-

upon

Le cours del
Tria de Legi-
matlon &
Bastardy.

upon Roger the younger Son of Sir Robert Corbet doth commence in the Ecclesiastical Court to reverse the Marriage between Lettice and Robert, and to put Lettice to silence. &c. wherefore Lettice doth purchase a Prohibition; whereupon Roger sets forth the whole matter, and prays a Consultation, which was denied him, and for this reason chiefly, *viz.* for that the Suit in the Ecclesiastical Court was to Bastardize the Issue between Lettice and Robert, and to prove Roger to be the Heir to Robert; and the Original Action of Bastardy shall not be first moved in the Ecclesiastical Court, but in the Temporal Court, &c. And to make this point yet the more clear two Cases put by *Bracton*, lib. 5. tit. de exceptionib. c. 6. were remembered (1.) B. having Issue of the Body of a Feme-Inheriatrix born before Marriage, under colour whereof he claimed to be Tenant by the Courtelie, but being for that cause barr'd in Assize brought by him against A. he obtained the Popes Bull, and by Authority thereof commenced his Suit in the Ecclesiastical Court, to prove his Issue Legitimate, *quod facere non debuit*, as *Bracton* there saith, and therefore Prohibition was granted to stay the Suit, shewing the whole matter, *Et quod prædictus B. ad deceptionem Curie nostrae, & ad infirmandum iudicium in curia nostra factum, trahit ipsum A. in placitum coram vobis in Curia Christianitatis, auctoritate Literarum Domini Papæ, ad prædictum puerum legitimandum, &c. Et cum non possint Iudices aliqui de legitimatione cognoscere, nisi fuerit loquela prius in curia nostra incepta per breve, & ibi Bastardie objecta, & postea ad Curiam Christianitatis transmissa, vobis prohibemus, quod in placito illo ulterius non procedatis, &c.* And in the same Chapter *Bracton* hath the form of another Prohibition, which makes the difference before put more evident, *Rex talibus iudicibus, &c. Ostensum est nobis ex parte A. &c. quod in causa successionis, & Hereditatis petitione, debet prius moveri placitum in curia nostra, & cum ibi objecta fuit Bastardia, tunc deinde transmitti debet recordum loquela & cognitio Bastardie ad curiam Christianitatis, ut ibi ad mandatum nostrum de legitimize inquiratur; quod quidem in hac parte non est observandum. Et cum hoc sit manifestum contra Consuetudinem Regni nostri, &c. vobis prohibemus, &c.* whereby it is very evident that if the Ecclesiastical Court proceed to the examination of Bastardy or Legitimation without direction of the Temporal Court, it is to be restrained by a Prohibition. (3.) As the Ecclesiastical Judge may not enquire of Bastardy or Legitimation without special direction or command of the King; so when he hath received the Kings Writ to make such Inquisition, he ought not to surcease for any Appeal or Inhibition, but ought to proceed until he hath certified it into the Kings Court; and this also

De Legitimate.

also appears by *Bracton* in the forecited place, c. 14. *Cum autem Judex Ecclesiasticus Inquisitionem fecerit, non erit ab eo appellandum, nec a petente nec a tenente: a petente non, quia talem Jurisdictionem & talem judicem elegit; a tenente non, quia sic posset causam in infinitum protrahere de judice in judicem usque ad Papam, & sic posset Papa de Laico feodo indirecte cognoscere.* See also to this purpose 39 Ed. 3. 20. a. in a Writ of Dower, where *Ne unques accouple en loyal Matrimony* was pleaded, and Issue thereupon joyn'd, the Writ issued to the Bishop to certify, who certified that he could do nothing by reason of an Inhibition which came to him out of the *Archbishops*. This return was held insufficient, for it was there said, that he ought not to surcease from doing the Kings command by reason of any Inhibition (4.) Lastly, it was said, that the very cause and reason why the Ecclesiastical Judge may not enquire of Legitimation or Bastardy, before that he hath received direction, or a Mandate out of the Kings Temporal Court, doth consist in this, that the Ecclesiastical Court never hath Jurisdiction or Power to intermeddle with Temporal Inheritance, directly or indirectly; It being observed that *Christ* Himself refused to meddle with a cause of that nature, when upon request made to him, *Luke 12. Magister, dic fratri meo ut dividat mecum hereditatem*, he answered, *Quis me constituit judicem aut divisorem super vos?* and therefore in the time of King *H. 3.* when the usurped Jurisdiction of the Pope was elevated much higher than ever before or since in the Dominions of the King of England, Pope *Alex. the Third*, having granted a Commission to the Bishops of *Winchester* and *Exon* to enquire *de Legitima nativitate* of one *Agatha*, the Mother of one *Robert de Ardena*, and if she were found Legitimate, then to restore to the said *Robert* the possession of certain Lands whereof he was dispossess'd, being informed that the King of England was greatly offended at the said Commission, he revoked and countermanded it in the point of the restitution of Possession, knowing and confessing that the establishment of Possessions belonged to the King, and not to the Church. Which Case is reported in the Canon Law, *Decretal. Antiq. Collect. 1. lib. 4. tit. Qui filij sunt Legitimi, cap. 4. & cap. 7.* where in the 4th Chap. the Commission, and in the seventh Chap. the revocation or countermand appears in express terms.

CHAP. XXXVI.

Of Divorce; as also of Alimony.

1. *What Divorce is, the causes thereof; the difference between the Civil and Canon Law touching the proof of Impotency, Frigidity, or Disability; and what manner of proof the Law requires thereof.*
2. *What time of absence in the Husband may cause a Divorce.*
3. *Whether Divorce by reason of Adultery dissolves the Marriage a vinculo? or whether the innocent Party may re-marry altera existente?*
4. *What the Canon in Concilio Arelatenſe provides in that Case.*
5. *The Opinion of some eminent Common Lawyers in this Point.*
6. *The different Opinions of Divines and Lawyers, and of each among themselves touching this matter.*
7. *The Opinion in summa Hostienſi, as also of Suarez, touching the Legality of second Marriage after Divorce.*
8. *The Canon of the Council of Trent concerning Matrimony; also the Opinion of some of the Ancient Fathers, and a Decree of one of the Popes touching second Marriages after a Divorce.*
9. *Decrees and Histories of great Antiquity relating to this Subject.*
10. *What the Pontifical Law, what Justinian, what Baldus, and what Grotius says in this matter.*
11. *Opinions in this Point take their diversification much from the cause of the Divorce, as whether ex causa præcedenti vel subsequenti.*
12. *Judgments at the Common Law, that a Divorce for Incontinency is only a Thoro & mensa, non a vinculo.*
13. *What the Law intends by Alimony, and what Elopement signifies; no Alimony due to her that Elopes.*
14. *In what cases the Law will allow Alimony, or not.*
15. *How the Civil Law provides in that Case of Alimony.*
16. *The Ecclesiastical Court is the proper Court for Alimony.*
17. *Whether the High Commission-Court had Power of Alimony, or not?*

18. *Prohibition denied to the Husband sued in the Ecclesiastical Court by the Wife for Alimony in causa sevitiae.*
 19. *Whether the Ecclesiastical Court may take Bond for Alimony, or Imprison for non-payment thereof.*

(1.) **A** Divorce is a Sentence pronounced by an Ecclesiastical Judge, whereby a Man and Woman formerly Married to each other, are separated and parted (a). The word *Divortium* or *Repudium* is often taken promiscuously, both for a Total and Perpetual Divorce, & a *vinculo Matrimonij*; as also for a Partial and Temporal Divorce, or Separation a *Cohabitatione, vel a thoro & mensa*. The causes of this Divorce, whereof some are precedent, others subsequent to the Marriage, are many in the Law; *Thomas Aquinas* reckons up no less than a dozen of them, and thinks he hath Poetically comprized them all in four Verses, viz.

Error. Conditio. Votum. Cognatio. Crimen.
Cultus Disparitas. Vis. Ordo. Ligamen. Honestas.
Si sis Affinis. Si forte Coire nequibis,
Hæc Socianda vetant Connubia, Facta retractant.

(b). But the Causes of Divorce in the Law as now commonly practicable, may be reduced to these few: (1.) The *Levitical Degrees* within which it is prohibited to Marry. (2.) *Precontract*, And so if a Man marry one precontracted, and have Issue by her, it is the Fathers Child until there be a Divorce upon the precontract, and then it is *Nullius Filius*, a Bastard (c). (3.) *Impuberty* or *Minority*, And so if two be married *infra annos nubile*, and after full age Divorced for the same, the Woman may bring an Assize against the man for Land given her in Frank-marriage (d), which proves that the Divorce is by that Law from the very Bond of Matrimony (4.) *Frigidity* in the Man, or *Impotency* in the Woman, termed *Arctitudo* in the Law; but the word [*Impotency*] is promiscuously used in both Sexes, for it is said that if after a Man be Divorced for *Impotency*, he take another Wife and have Children by her, these shall not be Bastards, because a Man may be *babilis & inhabilis diversis temporibus* (e). But in this Case the Civil Law hath made other provision, for that Law in *causa Frigiditatis* requires three years Cohabitation for Trial of the Disability before it doth upon other legal Evidence and Proof conclude any Married persons either *Frigid* or *Impotent*; Indeed the Canon Law expects present proof, and in case of such *Impotency* or *Frigidity*, not *Accidental* but *Natural* and *Incurable*, concludes that the Matrimony was never a Matrimony. The evidence of

(a) Co. par. 7.
 Kyrab's Case.

(b) Aquin. sup-
 plem. 3. par.
 q. 51, 52, 53.
 præsertim in
 4. Dist 34. q. 1.
 a. un.
 (c) Co. par. 6.
 66. & Dyer
 105.

(d) Lib. Ass.
 19. An. pla. 2.

(e) Co. par. 5.
 93. & Dyer,
 fo. 178.

which *Disability* depends on the Oaths of able *Physicians*, as also of aged and grave *Marjoms* experienced in such affairs; nor is it to be alledged till after a *Triennial* experience of each other *post Matrimonium Consummatum*; and is a just cause of *Divorce*, for that it frustrates one of the chief ends of Marriage, *viz. Procreation of Issue*, if it be sufficiently proved by *Inspection* of the Body, *Triennial Cohabitation*, and the Oaths aforesaid. *Consil. Matrim. To. 2. Consil. 8. nu. 1.* And in Cases doubtful whether it did precede the Marriage or not, the Law will presume it to antecede the Marriage, and consequently *null* it, in case it be *Natural*; otherwise, both as to the presumption and operation, in case it be only *Accidental*. *Sanch. lib. 7. diff. 103. nu. 4.* And where the *Impotency* doth sufficiently *Constare* to be *Perpetual* by the Oaths aforesaid upon *Inspection*, there the *Triennial* probation ceases. *Ue cum Glossæ, cap. Fraternitatis. De Frigidis & Malefcoijs, & Panor. nu. 11.* Pope Sixtus 5th in his Bull, *An. 1587.* declared that *Matrimonia cum spadonibus, vel eunuchis prorsus oviratis, seu utroq; testiculo carentibus, cum quibuscumque Mulieribus, seu defectum prædictum ignorantibus, seu scientibus, esse semperque fuisse irrita.* *Antonini Diana resolutiones morales. Tract. 4. Miscellam. resol. 75. p. 190.*

(2.) There are also other seeming causes of Divorce than what are forementioned; for the *Civil* and *Canon* Law do allow of Divorce after a *long absence*, but are not agreed touching the *Time* of that *Absence*; for in one place it is after *Two* years *Absence*, in another after *Three* years; in another after *Four*. *Cod. lib. 5. tit. 1. l. 1. post biennium, tit. 27. post tres An. l. 27. post Quatuor An.* others held, That the *Civil* Law requires *Five* years *Absence* before there may be a Divorce on that account. In the Council of *Lateran* a Sentence was allowed by the whole Council, which was given by a Bishop, pronouncing a Divorce for a Woman, complaining that her Husband had been absent *Ten* years, giving also leave to the Woman to *Marry again*. *In Concil. Later. par. 50. cap. 23.* But the truth is, no absence, be it for any time whatever, doth properly cause a Divorce in Law: Indeed *Seven* years *Absence* without any tidings or intelligence of or from the *Absent* Party, will so far operate in Law towards what is equivalent to a *Divorce*, as to indemnify the Woman from the penalty of *Poligamy*, if in that case she *Marry* again. Also the *Canon* Law hath decreed, that if the Wife refuse to dwell with her *Christian* Husband, he may Lawfully leave her. *Causa 28. q. 1. c. 4.* And some of the *Imperial* Laws allow Homicide, Sacrilege, Theft, Man-stealing, &c. for causes of *Divorce*, *Cod. lib. 3. tit. 17. l. 8.* But the *Canon* Law decrees otherwise. In the time of *Ed. 1. William de Chadworth* was *Divorced*, because he carnally knew the Daughter of his Wife before he Married

Married her Mother (o). The Stat. of 1 Jac. cap. 21. is the first Act of Parliament that was made against Polygamy. *Polygamia est plarium simul virorum, uxorum & concubinarum*. The difference between Bigamy, or Trigamy, &c. and Polygamy is, *Quia Bigamus seu Trigamus, &c. est, qui diversis temporibus, & successive duas, seu tres, &c. uxores habuit. Polygamus, qui duas vel plures simul ducit uxores*. And if the man be above the Age of fourteen (which is his Age of Consent) and the Woman have the Age of twelve (which is her Age of Consent) though they be within the Age of twenty one, yet they are within the danger of the Stat. of 1 Jac. cap. 21. — Co. Inst. Par. 3. Cap. 27. *vid. Inst. par. 1. Sect. 104.*

(o) Term.
Pasch. 30 Ed.
1. coram Rege.

Co. Inst. par. 3.
cap. 27.

(3.) This matter of Divorces hath often ministred occasion for high debates and altercations touching second Marriages, as whether a Divorce by reason of Adultery in either of the married Parties, doth so dissolve the Marriage a vinculo, as that it may be lawful for the Innocent Party to Marry again during the others life? By the 107th Canon, It is provided, that in all Sentences for Divorce, Security be given and Bonds taken for not Marrying during each others life (a). By enjoying such Security to be given, and such Bonds to be taken, this seems to be a penal Canon, viz. pecuniarily Penal; whoever therefore breaks the Law incurs the penalty, and whoever suffers the penalty doth answer and satisfy the Law which before he had infring'd; a penalty expressed or implied, provided for in, and annexed unto a Law that is in it self prohibitory, seems to create some qualification of that legal prohibition, *Prohibitio vim suam exercere potest per penam vel expressam vel arbitriam: Et hoc genus Leges Imperfectas vocat Ulpianus, quæ fieri quid vitant, sed factum non rescindunt*. So Grotius de jure Bel. & Pacis, lib. 2. cap. 5. Sect. 16. But to speak a little nigher to the point in hand, it is Grotius again in the same place, *Si Lex humana conjugia inter certas personas contrahi prohibeat, non ideo sequitur irritum fore Matrimonium, si re ipsa contrahatur: sunt enim diversa prohibere, & irritum quid facere*. The Laws whether Ecclesiastical or Temporal are not of any private interpretation; yet to speak herein only hypothetically, if this be interpretative as a penal Canon by virtue of the said Security and Bond, then apposite and observable is that which Grotius hath in another place, in Casu Legis Penalæ, his words are these, *viz. Rex qui est Auctor Legis, & ubi Regni ipsius personam & auctoritatem sustinet, quæ talis est, potest legem etiam totam tollere; quia Legis humana natura est, ut a voluntate humana pendeat, non in Origine tantum sed & in duratione. Sicut autem totam Legem tollere potest, ita & vinculum ejus circa personam aut factum singulare, manente de cætero lege Dei ipsius exemplo, qui (Lactantio teste) legem cum pone-*

(a) Canons
Ecclesiastical.
Edit. 1603.

ret, non utiq; ademit sibi omnem potestatem, sed habet ignoscendi licentiam. Imperatori, inquit Augustinus, Licet revocare sententiam, & Reum mortis absolvere & ipsi ignoscere: Causam explicat, Quia non est Subiectus Legibus, qui habet in potestate Leges ferre. Grot. ibid. de Pœnis, cap. 20. Sect. 24. How far the Power of Princes may extend it self in this matter, is not before us; But clear it is, that all such as acknowledge the Regal Supremacy, will withall confess, that his Majesty hath more right to dispence with Canons within his own Dominions *ex plenitudine potestatis Regalis*, than was here formerly Exercised *ex usurpatione potestatis Papalis*. In all Laws that are both Prohibitory and Penal, as they are of the more force by reason of their Prohibitory quality, so they seem to abate of that force by reason of the annexed penalty; for he that suffers the Penalty, satisfies the Law, though he transgress the Command. The Statute of *primo Jacobi* hath a Proviso or exception to second Marriages by persons legally Divorced; (d) no Canons or Constitutions prevail or are executable, in repugnancy to the Kings Prerogative, or to, the Laws or Statutes of this Realm. (e). That Statute of *primo Jacobi* prohibiting second Marriages during the Life of each other, doth not only not extend to Persons legally Divorced, but as to such it is with an exception, limitation or proviso as aforesaid. Sir Ed. Coke taking notice hereof in Porter's Case, reports that that Statute extends only to Persons which are Divorced by Sentence in the Spiritual Court (f); And that distinction of Total and Partial Divorce, Or that *vel a vinculo vel a Mensa & Thoro*, will not it seems satisfy all Judgments, some alledging that *ubi lex non distinguit, nec nos distinguere debemus*, applying that Rule *ad Evangelium* also; and thence will not be persuaded but that the innocent Party in *Causa Divortij ob Adulterium* may Marry again, *altera parte existente*, because though they know it to be otherwise by Text Canonical, yet know not where to find it so by Text Scriptural; and specially because they find a Proviso in the said Statute of *primo Jacobi*, that the Parties Divorced by Sentence, if he take another Wife, or she take another Husband, shall not be within the danger of the Statute; And that this extends to every manner of Sentence of Divorce, and not to any particular cause of Divorce. Cajetan, though of the Roman Church, yet on the 19th of Matthew saith, *Intelligo ex hac Domini Jesu Christi lege, licitum esse Christi-ano dimittere uxorem ob Fornicationem carnalem ipsius uxoris, & posse aliam ducere*: and soon after adds, *Non solum miror sed stupeo, quod Christo clare excipiente causam Fornicationis, torrens Doctorum non admittat illam Mariti libertatem*. This Question, Whether after Divorce for Fornication it be lawful to Marry again during the Lives of the Parties Divorced, is at large handled by the Learned Doctor

(d) St. 1 Jac.
cap. 11.

(e) St. 25 H.8.
c. 19.

(f) Porter's
Case, Co. Rep.

Doctor Hammond in his Treatise of Divorces; where he says that *Mat. 19. 9.* and *Mark 10. 6.* are two places of such perspicuity (one Cause of Divorce allowed the Christians, that great Breach of the Conjugal Vow, and whosoever Divorces and Marries again, save in that one Case punctually named, *committeth Adultery*) that as no Paraphrase can make them more intelligible, so there is but one Question that can reasonably be started in them, *viz.* Whether he that puts away his Wife on this one *Authentic Cause*, be so perfectly freed from the Conjugal Vow and Bands, that he may Lawfully Marry some other Woman, and some other Man Marry that Divorced Adulterous Wife? In *Mat. 19. 9.* The words are, That whosoever shall put away his Wife, save for Fornication; and shall Marry another, committeth Adultery; and he that shall Marry her that is put away, committeth Adultery: Which words (says that learned Author in *Sect. 22.*) are favourable to the affirmative, that it is Lawful for him in that one excepted Case to Marry again. The nature of a Divorce among the Jews was the rescinding of the Conjugal Bands, and by one supposition common to Jews and Romans, *viz.* That they who were duly Divorced might Marry again; So of the Jewish Divorced Wife, *Deut. 24. 2.* 'tis expressly said, she may marry another; and of the Man, this was his only End of putting away his Wife in that place, that he might Marry another: Accordingly the Form of Divorce in *Misna, tit. Gittin, Bebold, thou art free, or at liberty for any man, and this is the Bill of Divorce between me and thee, so that it is free for thee to marry to any man thou wilt. Idem. Sect. 27.* yet on the other side (says that Learned Author) it may be argued, that although in the Mosaical Law, Divorce was the rescinding the Conjugal Bands, to which it was consequent, as long as the Jewish polity lasted, that they who were duly Divorced (as in the one Case of Fornication) might freely Marry again: yet in the acceptation of our Christian Courts, Divorce appears not to be any more than the Solemn Judicial separation from Conjugal Society, as that it seems to be rather the freeing the Husband and Wife from the Obligation to mutual Conjugal Duties, than the utter rescinding and dissolving the Bands. For if it were so, then that Husband and Wife could never come together again without a new Wedlock, which was never heard of in the Church. That Adultery, the efficient cause of Divorce (though a Breach of the Conjugal Vow) is yet no actual dissolution of the Conjugal Bands, among us Christians, seems probable (says Doctor Hammond) by these two evidences (1.) Because Adultery committed by the Husband, dissolves not Marriage, which yet it equally should, if that fault committed, and not the Sentence of Divorce rescinded the Conjugal Bands, &c. In this a difference is observable

servable between us and the Jews; for in case of Fornication, the Jews expected no Sentence of the Consistory, but the Man might put her away, give her from himself a Bill of Divorce, which was never allowed or practised among Christians. 2. Because if this were so, if Adultery in the Wife dissolved the bands, then the Husband, that after the Wifes Adultery continued to live with her Conjugally, must be concluded to commit Fornication with her, the validity of the Bands being it (and nothing else) which makes Conjugal Society Lawful. Accordingly hath the Opinion of the Church been anciently, as in Can. Apost. 48. *If any Laick put away his Wife and Marry another, or Marry a Woman which hath been put away by another, let him be Excommunicate.* So likewise at the Council of Arles, An. 314. Can. 10. *De his qui Conjuges suus in Adulterio deprehendunt, & iidem sunt Adolescentes Fideles, & prohibentur nubere, placuit ut in quantum possit, concilium ijs detur, ne viventibus uxoribus suis, licet Adulteris, alias accipiant.* Likewise in the Milevitan Council, An. 402. at which St. Augustin was present, it is decreed, that secundum Evangelicam & Apostolicam Doctrinam, neq; Dimissus ab uxore, neq; Dimissa a Marito, alteri conjungantur, sed ita maneant, aut sibiimet reconciliantur. So also in the Codex Can. Eccl. African. Can. 102. *mei τῶν τὸς ἀνδρες ἢ τὰς γυναῖκες ἀπολύσαντων ἢ αὐτοὺς μετάνων.* That they that are Divorced from Husbands or Wives, should remain unmarried. And what hath thus been defined by these Canons, is evidently received into the Ecclesiastical Constitutions of this Church, which therefore hath decreed, that when Divorcees are pronounced, *Monitio & prohibitio fiat, ut a partibus ab invicem segregatis caste vivatur, nec ad alias Nuptias alterutra vivente comvolvatur.* Constit. Eccl. An. 1597. Upon these Arguments pro & con, Doctor Hammond in the forecited place doth conceive, that the Resolution may be made by these three Propositions: (1.) That by the force of Christs words in all the Evangelists, he that Marries again after any kind of Divorce, but that one for Fornication, doth commit an Unchristian sin. (2.) That by force of the Arguments first produced, for the interpreting Mark and Luke by Mat. 19. 5. vid. Doctor Hammond of Divorce, fo. 452, 453. it may be probably concluded that in that one case of Divorce for Fornication, the Marriage of the Innocent Party shall not be Adulterous. (3.) That although this be granted, yet the words of St. Mark and Luke, especially the words of St. Paul, 1 Cor. 7. 39. do give such prejudices against Marriages after Divorce indefinitely; that the ancient Canons of the Church, and the Constitutions of our English Reformation, have thought fit not to permit such liberty in any kind, and therefore that this may be the better observed, the decree of separation shall,

not

not be pronounced, till they that demand it, shall give sufficient Security that they will do nothing against the *Admonition* and *Prohibition*; for our Constitution adds, *Denique quo illud firmitus observetur, sententia separationis non antea pronunciabitur, quam qui eam postulerint, Cautionem Fidejussoriam sufficientem interposuerint se contra monitionem & prohibitionem nihil commissuros*, which if not observed by the Judge, he is punishable, and the Sentence of Divorce for such defect declared void. *Constit. Eccl. An. 1597.* Innocent the first Bishop of Rome saith, *Qui interveniente repudio, alij se Matrimonio copularunt, in utraq; parte Adulteros esse manifestum est, &c.* But the said Judicious Author conceives, that of this and the like Testimonies it may be observed, that most of them belong not to these Divorces, which are in case of Fornication, but (proportionably to Christ's words in St. Mark) to those which according to the Jewish or Imperial Laws were allowed in other Cases, than what either Christ, or the Primogenial Institution of Marriage had allowed of: And further saith, that it is evident and confessed by all Christians, that of These, that is, the Marriages (after such Divorces by the Jewish and Imperial Laws) are Adulterous, but not so of those other Marriages of the innocent Parties after those other Divorces in that one Case of Adultery. Yea and some Canons have been made with this Temperament expressly (except in the case of Fornication) so in the second Canon of the Council of Vannes, *eos qui relictis uxoribus suis, sicut in Evangelio dicitur, excepta causa Fornicationis, sine Adulterij probatione alias duxerint, statuiamus, &c.* They that have left their own Wives, as it is said in the Gospel, except for cause of Fornication, and without proof of Adultery shall have married others, we judge them, &c. Notwithstanding which, the Law tells us of other Cases than that of Adultery or Fornication, wherein the Man after a Divorce may re-marry during the Life of the Woman Divorced, as in the Case of *Architude*, which you may find in *Summa Apenfi, Lib. 8. De Divortio propter impotentiam, Tit. 37. fo. 233.* Si archatio alligetur (subaudi quicumq; impotentiam Faminæ) statim potest Divortium Fieri hoc modo, viz. vocabuntur Matronæ fide dignæ, & in Nuptiali opere expertæ—*Ar. F. de Vent. inspect. l. 1. verb. igitur, &c.* Et si Mulieres asserant eam non posse fieri Naturaliter Matrem, tunc statim potest Divortium fieri, & dabitur viro Licentia cum alia contrahendi. It will not be denied, but that in all Cases where the Marriage was *ab initio* Null, there it shall, after a legal Divorce, be free for either party *convolare ad secundas Nuptias altera parte existente*, which strictly and properly cannot be said to be a second marriage, because precedent to it, there was duly and legally none; nor therefore can they be properly said to be Divorced, Separated,

or put asunder, that never were *de jure* put together. Among the several kinds of these Null Marriages may be computed that which *Parnormitan* speaks of in his Fourth Tract de *Sacramentis. Resol. 20 r. Famina* (says he there) *si commode non potest aptam se reddere viro, impedimentum censendum esse perpetuum, & Matrimonium declarandum Nullum*; which holds true *vice versa*, and therefore it is likewise said, that *Famina per contractum Matrimonij jus suum tradit viro apto, non inepto, atq; in non aptum nullum transfertur jus*. The Canon Law is express in prohibiting these second Marriages after a Divorce, although *Ex causa Fornicationis*. So *Tostatus, verb. Matrimonium, ubi voluit nullam esse Causam Repudij, nisi Fornicationem*; *Et istam non quidem simpliciter ad Dirimendum Matrimonium, sed ad tollendam Cohabitationem, ut patet, Extra. de Divort. c. Gaudemus*. The Lawyers and Divines (says *Adam Tannerus*) are of different opinions in this Point, *Juristæ Divortij voce nuntur pro Dissolutione Matrimonij etiam quoad vinculum, ut constat ex toto tit. F. De Divortijs. Theologi tamen ea voce Divortij solum significant separationem inter conjuges, aut quoad Cohabitationem, aut quoad Thorum. Adam. Tannerus, Tom. 4. Dissus. 8. de Matrimonio, q. 5. Dub. 5. nu. 74. de Divortio.*

(4.) In concilio Arelatensi, which was held in An. 314. at the Command of *Constantine the Great*, under Pope *Sikvester* in the first Year of his Papacy, it was Canoned, *Ut is cujus uxor Adulterauit, aliam illa vivente non accipiat*. Sir *Hen. Spelman* gives the words of this Canon thus, *viz. De his qui conjuges suas in Adulterio deprehendunt, & iidem sunt Adolescentes Fideles & prohibentur Nubere; placuit ut in quantum possit, Concilium ijs detur, ne viventibus uxoribus suis, licet Adulteris, alias accipiant* (g). If this Canon be not directly prohibitory, and against second Marriage after Divorce in Case of Adultery during the Life of the other Party, yet it provides that Counsel or Advice in the Case be given against it, and the Parties monished to the contrary.

(5.) Mr. Attorney *Noy* in *Dame Powels Case* reports, that a Divorce *causa Adulterij* is but *a mensa & thoro, & non a vinculo Matrimonij*; and the reason he gives is this, *viz.* Because (says he) the offence is after the just and lawful Marriage (b); if for this Opinion of his any *Anticanonist* should dream, that he died in the Catholick Faith of Matrimonial Sacraments, let him consult Sir *Edward Coke* in the Third part of his *Institutes*, where he doth not only allow of that Member of the foresaid distinction, but withall says, that in the Case of Divorce *a Mensa & Thoro* the second Marriage is void, living the former Wife or Husband (i). Yet in *Bury's Case* he reports it to have been adjudged, that by a Divorce the

(g) Sir H. Spelm. Concll. de Concll. Arelat. Can. 10.

(b) Dame Powels Case against Wicks. Noy's Rep.

(i) Co. Instit. 3. par. cap. 17. Polygamy.

the Marriage is dissolved a *Vinculo Matrimonij*; and also resolved, that admitting a second Marriage to be voidable, yet it is adjudged that the same doth remain in force until it be dissolved; and that the Issue born during such second Coverture is lawful Issue to inherit the Land (k).

6. Touching the kinds and effects of Divorce, whether Divorce a *Vinculo Matrimonij*, or separation only a *Mensa & Thoro*, with the causes thereof; the Divines and Lawyers are of different Opinions, and each of these divided among themselves; some conceive, that as there be Divorces *Ex Causa precedente*, so there are some *Ex Causa subsequente*, as *Causa Adulterij*, and that Adultery dissolves the very Bond of Matrimony, which consisteth in their being one Flesh. And whereas it is written, *That whosoever shall Marry her that is Divorced, committeth Adultery* (l), they will have it to be meant only of such as shall marry her who is Divorced for any other cause or reason, than for Fornication; which they infer from the former part of *Matth. 5. 32*, *That whosoever shall put away his Wife, saving for the cause of Fornication, causeth her to commit Adultery*; so that for the cause of Fornication it is lawful to put her away, and whoever shall marry her that is (say they) Divorced for any other cause, committeth Adultery; whence they would infer, that a Remarriage after Divorce for the cause of Fornication is not forbidden; And as for that Divorce or Separation a *Thoro & Mensa*, they look on it as no current Coin, not having (as they pretend) *Cæsar's Image* or Supercription thereon, but seem very positive in affirming that *Pharisei interrogabant Christum de dimissione quoad vinculum, & non quoad Thorum & mensam*. It is true indeed, by the Judaical Law a Woman Divorced from her Husband in *causa Adulterij* might be another mans Wife (m); (m) *Deut. 24. 1, 2.* which is no contradiction to *Matth. 5. 22.* if the Divorce there mentioned be a *vinculo*. But that which such as are Post-repudiary Marriages much insist on, is that which the Reverend Mr. Beza hath on the like place. *Qui hinc colligunt* (says he) *post Repudium Nullum esse secundo Matrimonio locum, altera parte existente, inapte colligunt*; loquitur enim Christus de Repudijs apud Judæos usitatis, inter quæ numerari non potest Repudium ob Adulterium, cum Adulteros ex lege oportet Capitali pena plecti. Beza in Luke 16. 19. Levit. 20. 12. and Deut. 22. 22.

(7.) If *ingressus in Religionem* be (as some understand it) a kind of *Mors Civilis*, then it should seem it might be for that reason that in such case it was lawful for the other Party *convellere ad secundas Nuptias*, for by the 118 Canon of Egbert Archbishop of York An. 750. called *Canon Africanensis*, in *exceptionibus suis e Canonibus Patrum Concinnatis*, it was lawful so to do, the words of the Canon are, *Si vir sive Mulier ex consensu Religionem ceperit, licet*

alterum accipere novum conjugium; But from hence no Argument can be drawn to prove the Lawfulness thereof in *Causa Divortij*. The Cardinal of Segutium in his *Summa Hostiensis* seems to be of Opinion, that it is Lawful in case of Divorce to Marry again: the words of that famous Canonist are, *Debet Judex sententiam Divortij partibus tradere in Scripturam publicam redactam, ne Filij suscepti ex secundo Matrimonio, probatione deficiente, valeat præjudicium generari* (n). But Cardinal Navarr seems to be more positive in the Point, where he Affirms, that *Matrimonium Contractum cum secunda post sententiam Divortij, valet*, provided it be post *Triennemalem Cohabitationem*, as the Canon Law requires, in *causa Impotentiae*. Navarr. Concil. l. 4. Concil. 1. de *Frigida*, n. 3. p. 414. But it seems strange that Sanchez a Jesuite, and one of the highest form, arguing the Question against the Hereticks, as they are pleas'd to call us, should so ingeniously confess, that *ex ipsis Catholicis aliqui existimarunt, omnino dissolvi Matrimonium quoad vinculum eo propter Adulterium alterius Conjugis separato: atque ita licere aliud Matrimonium inire, priori Coniuge superstite*. Sanch. de Matrim. Tom. 3. l. 10. de Divor. Disp. 2. n. 1. & Navar. lib. 4. Concil. 1. n. 3.

(n) Sum. Host.
lib. 3. de Di-
vortijs, nu. 11.

(8.) This, *utrum ob Adulterium alterius Conjugis dissolvatur Matrimonium quoad vinculum, ita ut integrum sit innocentis ad alias Nuptias transire, altera parte vivente?* was a question long since controverted by Bellarmin, and by Valentia, Bellarm. l. 1. de *matrim.* c. 15. Valent. lib. unic. de *indissolubilitate matrim.* cap. 3. And by them admitted as disputable with a *Non obstante* to the Council of Trent: whereby Matrimony is highly Sacramentiz'd, as appears by that which the said Tridental Council declares concerning it, *viz. Matrimonium est Sacramentum, quod ex opere operato confert gratiam secundum Communem & veram opinionem, quam pro infallibili Articulo Fidei tenendum esse, aut Concilium Trident. & declaravit Navar. lib. 4. Concil. 1. n. 3.* Yet the forementioned Sanchez doth cite Sixtus Senensis bringing in Origen *Affluentem sui temporis Episcopos permisisse alias Nuptias uxoris ob virorum Adulteria ab ipsis divergentibus*: Sanch. ubi supra Sixt. Senens. lib. 6. Bibliothec. Of which Judgment also was St. Ambrose (as he affirms:) also Tertullian, Erasmus, Cajetan and Catherinus. Tertul. lib. 4. contra Marcion. Erasim. Annot. ad 1 Cor. 7. Cather. l. 5. Annot. contra Cajetan. in fin. Cajetan. in Mat. 19. in illud, *quicumq; dimiserit*. This also, saith Sanchez, was the Judgment of the Greek Church, as Guido the Carmelite reports; and of this Judgment are both the Lutherans and Calvinists; yea, it was the Judgment also of a Pope, Pope Zacharias the First, who expressly Decreed in these words, *viz. Concubivisti cum sorore uxoris tue, Neutram habeam; Et si*

si illa quæ uxor tua fuerit, Conscia sceleris non fuit; si se continere non vult. Nubat in Domino cui velit. Cap. Concubuiti. 32. quest. 7. And as to the Husband St. Ambrose is express in the Case, uxor a viro non discedat, nisi causa Fornicationis; quod si discesserit, aut maneat inuopia aut reconcilietur. Ideo, non subdit de viro, quod de uxore præmisit, quia Viro liceat ducere aliam. D. Ambros. ad I Cor. 7. & refertur, cap. uxor. 32. q. 7. So likewise Ex concilio apud Vermerias, it is express, that Maritus (uxore conciliante mortem ejus) possit ipsam uxorem dimittere, & si voluerit aliam ducere, refertur c. si qua Mulier. 31. q. 1.

(9.) In the First Year of Lotharius King of Kent, An. 683. In Concilio Herudfordiæ, it was decreed, that Nullus Conjugem impropiam, nisi (ut sanctum Evangelium docet) Fornicationis causa relinquat. Quod si quisquam propriam expulerit Conjugem Legitimo sibi Matrimonio Conjunctam, Si Christianus esse recte voluerit, nulli alteri copuletur: sed ita remaneat, aut propriæ reconcilietur Coniugi (y). In those days it seems he was reputed scarce a Christian, that being separated from his Wife presumed to Marry another. And above two hundred years before, in St. Patricks Synod, viz. In Synodo Sancti Patricij, aliorumq; Episcoporum in Hibernia Celebrata, circa An. Christi 450. vel 456. It was decreed, that the punishment of a Woman departing from her Husband, and joyning her self to another Man; should be Excommunication (z). In the time of H. 3. and in the Case of Simond de Muntford, between him and his Wife, the Pope ratified his Marriage, after he had dispensed therewith contrary to the Laws and Canons (a). King John being Divorced from the D. of Glocesters Daughter, viz. the third of June, 1199. soon after, viz. before the 8th of October then next following, was Remarried to Isabel, sole Daughter and Heir to the E. of Engolism. Likewise Alice Daughter of the E. of Savoy, and King John's first Wife, was Married to him after she had been the Divorced Wife of Henry de Lyon, D. of Saxony. Speed Chron. in vita Johani. R. Angl. Also King Henry the 8th after he had been Divorced from Q. Katherine, his Brothers Relict, and after above twenty years cohabitation with her, Married again (during her Life) the Lady Anne Bullen, by whom he had Q. Elizabeth. These are Presidents of Fact, not of Law; For,

(10.) Alceat asserts, That bodie Jure Pontifico permittitur solum separatio ex certis causis, nec interim licet aliam ducere, etiam si separationi uxor causam dederit: yet withall he says in the same place, Alier tamen aliqui ex Antiquis Patribus olim observavere, inter quos Ambrosius, qui ex justa causa Marito jus divertendi atq; aliam ducendi, &c. Non enim hos homo separat, sed Deus, quando ita Optimis Antistitibus propter malos Faminae mores videtur. Alceat. de verb. sig.

(y) Spelma.
Concil. de
Concil. Herudford. art. 10.

(z) Idem de
Synod. Sancti
Patricij Sect.

19.
(a) Mar. Paris
Hist. Angl.
p. 455.

l. 101. inter stuprum. Sect. Divortium. In which place the same Author further adds, It is no wonder that the Emperor *Justinian* himself was somewhat sparing in this Point, when the Pontifical Canon *passim tempestate sua observatus fuisset: ut forte credendum sit, Licere Pontifici eos Canones tollere, & jus Romanum observari, si velit.* *Grotius* says, *Cum ea alteri Nupta est, Matrimonium haud dubie irritum lege quidem Naturali, nisi vir prior eam dimiserit.* *Grot. de jur. bel. lib. 2. cap. 5: sect. 11.* And in the Matrimonial Councils it is express, That *Mulier a primo Matrimonio per sententiam separata, cum eo, cum quo secundo nupsit cum Auctoritate Ecclesiae manere debet.* *Concil. Matrim. Concil. Baldi 3. nu. 3.* Where the judgment of the famous *Baldus* is, That *Contrabentes Matrimonium cum Auctoritate Ecclesiae, & vigore sententiae Divortij, praesumuntur esse in bona fide, nec Adulterium committent.* *ibid. nu. 17.*

(11.) Although the D. D. are much divided in this Point of second Marriage, whilst the Divorced Parties are alive; yet the Law generally seems much more to incline to favour such second Marriages, where the Divorce is *ex causa praecedenti*, than where it is, *ex causa subsequenti*; For when it happens, *ex causa praecedenti*, as when the Degrees prohibited are violated, Precontract, Frigidity in the Man, Impotency in the Woman, or other perpetual Impediment, the Marriage was void and null *ab initio*, it being a Rule and a truth in Law, That *non minus peccatum jungere non Coniungendos, quam seperare non separandos*; But where the Divorce happens *ex causa subsequenti*, there the marriage was once good and valid in Law, and therefore (as some hold) *indissoluble*; and that such subsequent cause can have no influence *quoad vinculum Matrimonij*, but only *quoad separationem a Mensa & Thoro*, which is but a Partial or Temporal, not a Total or Perpetual Divorce. *A.* was Divorced from his Wife for Incontinency, he after took another Wife, living the first Wife, Adjudged, the second marriage was void, because the Divorce was but a *Mensa & Thoro*, and not a *Vinculo Matrimonij*. *Rye and Juliam's Case. More's Rep. Zanches* says, that *Quoties Matrimonium dissolvitur, si id fit ob utriusq; Conjugis perpetuum impedimentum, utriq; aliae Nuptiae interdicendae sunt: Si vero ob alterius tantum impedimentum illi interdiciuntur, concessa non impedito Licentia ad alias transeundi.* *Sanch. Matrim. lib. 7. Disp. 93. nu. 37.* And again in the same place, *Viro ratione Frigiditatis separato, conceditur Feminae Licentia Nubendi alij, ea viro denegato: Et Feminae ob impedimentum separatae interdicto alio Conjugio, id non denegatur sed conceditur viro.* *ibid. &c. Laudabilem de Frigid. &c. 2. in fin. 33. q. 1. &c. ex literis, ead. tit.* Likewise the *Summa Astenfis* hath the same in substance, *si Aretatio alligetur (subaudi quaecumq; impotentiam Feminae) statim potest Divortium fieri hoc modo*

modo: vocabantur Matronæ fide dignæ, & in Nuptiali opere expertæ, ar. ff. de ventr. inspect. l. 1. verb. igitur, &c. Et si Mulieres assensum eam non posse fieri Naturaliter Matrem, tunc statim potest Divortium fieri, & dabitur viro Licentia cum alia contrahendi. Sum. Aftens. in l. 8. de Divor. propter Impotent. tit. 37. fo. 233. as aforesaid: yet Tostatus on the 19th of Mar. saith, that *Fornicatio non valet simpliciter ad dirimendum Matrimonium. sed ad tollendam Cohabitationem* Tostati Index. verb. Matrimon. as appears also by the Canon Law. Extra de Divor. &c. Gaudemus, &c. Quare factò Divortio (says Tostatus again) non transeat ad aliud Matrimonium, Tostat. ibid. for which he there quotes St. Hierome (o), who in this Point is opposed by St. Ambrose (p). Possibly the different constructions that Divines and Lawyers do make of this word [Divorce] may not be the least reason of the different Opinions in this Point: for Adam Tannerus (as aforesaid) tells us, That *Juristæ Divortij voce utuntur pro Dissolutione Matrimonij etiam quoad vinculum, ut constat ex toto tit. ff. de Divortijs. Adam Tannerus. Tom. 4. Disp. 8. de Matrim. q. 5. Dub. 5. de Divortio Col. 2232. nu. 74. & varijs de causis solvi posse, ut videtur in iisd. Legib. & apud Greg. Syntag. jur. par. 2. lib. 9. cap. 5. Theologi tamen ea voce Divortij solum significant separationem inter Conjuges, aut quoad Cohabitationem, aut quoad Thorum. Tannerus ubi supra.*

(12.) F. being Divorced for Incontinency of the Wife, he afterwards marries P. the Daughter of R. living the first Wife. By the whole Court that is a void Marriage; for the Divorce is not, but a *Mensa & Thoro*, and does not dissolve *vinculum Matrimonij*. And by Whitgift Archbishop of Canterbury. So also is the Opinion of Divines and Civilians (q). As also in Dame Powells Case against Weeks formerly hinted. In Dower it was resolved, That a Divorce *Causa Adulterij* is no Bar of Dower, because it is but a *mensa & thoro*, and not a *Vinculo Matrimonij*. And it was said by Daniel, that an Elopement is not a Bar of Dower *ad ostium Ecclesiæ*. And Judgment for the Plaintiff (r).

Agar of Kingston upon the Thames was sued in the Ecclesiastical Court for beating his Wife, and for calling her *Whore*, and was Sentenced there to pay his Wife three shillings a Week for her Alimony, and divers Fines were imposed upon him for not performing thereof, and a Prohibition was granted, and also a *Habeas Corpus*, to deliver Agar out of Prison (s).

There was a Case of late years, where a Man married the relict of his great Uncle, he married his Grandfathers Brother's Wife by the Mothers side, and it was held lawful, it was the Case of one Harrison against Dr. Burwell (t). But where a Man married his Wives Sisters Daughter, it was held unlawful, and after a Prohibition

(o) D. Hieron. in Mat. tom. 5. 190. F. and 188. C. and 185. D.

(p) D. Ambros. ubi supra.

(q) Hill. 44 Eliz. Rye vers. Falcombe in Noy's Rep. and Moor's Rep. Case 893.

(r) Dame Powell vers. Weeks. Noy's Rep.

(s) Agar's Case in Brownl.

Rep. pa. 2.

(t) Trin. 20

Car. 2. C. B.

Rot. 2042.

Harrison vers.

Doctor Burnel

Vaugh. Rep. &c.

Arg.

(u) Cro. 33.
El. 228.
Minn's Case.
vid. dict. Case.
Harrison, &
vid. Case. Hill
vers. Good in
Vaugh. Rep.

Co. 5. Baris
Case.
40 Eliz. C. B.

Pasch. 12 Car.
B. R. Porter's
Case.—
Cro. par. 3.

tion a Consultation in that Case was granted (u). But Marriages with Cozen-Germans are in the said case of *Harrison* against Doctor *Burwell* reported by Sir *John Vaughan* to be lawful; in which Case, as also in the Case of *Hill* against *Good*, reported likewise by the said Sir *John Vaughan* Chief Justice, the Reader may find what Marriages are Lawful, and what not, what Marriages are prohibited within the *Levitical* degrees, and what Marriages are by Gods Law otherwise prohibited.

In the Case between *Webster* and *Bury* in an *Ejectione Firma*, a special Verdict was given upon Divorce between *Burie* and his Wife *causa Frigiditatis*, and that his Wife for three years after his Marriage *remansit virgo intacta, propter perpetuam impotentiam generationis in viro, & quod vir fuit ineptus ad generandum*; and in this special Verdict all the examinations of the Witnesses, upon which the Judge in the Ecclesiastical Court was moved to give his Sentence, by which the perpetual disability of *Burie ad Generandum* was manifest, were read; and by which it was pretended, that the Issue which he had by a Second Wife was illegitimate, and this was the doubt of the Jury; and it was adjudged that the Issue of the second Wife was Lawful, for it is clear that by the Divorce (*causa Frigiditatis*) the Marriage is dissolved *a vinculo Matrimonij*, and by consequence either of them might Marry after; then admitting that the second Marriage was *avoidable*, yet it remained a Marriage until it was Dissolved, and by consequence the Issue that is born during such *Cverture* (if no Divorce be in the Life of the Parties) is Lawful, *Et homo potest esse habilis & imhabilis diversis temporibus*, and Judgment affirmed in Error.

A. was indicted upon the Statute of *Primo Jacobi* for having two *Husbands*. It was found that *A.* was Lawfully Married to *N.* and before the Judge of the Audience she sued a Divorce against *P. propter sevitiam*: whereupon it was decreed that *propter sevitiam* of her Husband, she should be separated *a Mensa & Thoro*, and it was expressed in the Sentence, that she should not marry any other during the Life of *P.* she afterwards (*P.* Living, and she knowing thereof) took to Husband *J. S.* The Question was, whether that were Felony within the Statute. It was said in this Case, that this being a *Divorce Causa Sevitie*, was but a separation *a Mensa & Thoro*; and not a Dissolution *a vinculo Matrimonij*; and therefore that the Marriage continued between them. The Court doubted, whether the *Proviso* in the said Statute did extend to every manner of Divorce; but inclined to be of Opinion, that she was not within the *Proviso*; for if this should be suffered, many would be Divorced upon such pretences, wherefore the Court advised the Woman, to procure Pardon to avoid the danger of the Statute.

Debt

Debt against Husband and Wife, as Executrix of her former Husband; the Defendants plead by Attorney, that they were Divorced before the Writ brought; It was Adjudged, that the Writ should abate; for it shall be presumed, the Divoce continueth, if the contrary be not shewed. In another Case, being for Debt upon an Obligation, where the Defendant said, that at the time of the making of the Obligation she was Wife to J. S. who is yet *in vita*, and so *non est factum*: The Plaintiff said, that after the making of the Bond, there was a Suit in the Ecclesiastical Court between the said J. S. and the Defendant, for that the said J. S. had another Wife alive at the time of the Marriage betwixt them, so as the Defendants Marriage was adjudged void. It was the opinion of the Court, that this Divorce was but *Declarative*, for it was void *ab initio*, and so the Defendant sole always, and adjudged for the Plaintiff.

Underhill and Brooks Case.
Cro. par. 1.

Mich. 43 & 44
Eliz. B.R. *Red-*
disden & Wo-
gan's Case.
Cro. par. 1.

The Wife Libelled against the Husband in the Ecclesiastical Court for Alimony, because he beat her so as she could not live with him, a Prohibition was prayed, but denied by the Court; and it was held in this Case, that the Wife might have the Peace against her Husband for unreasonable correction.

Sir Tho. Sim-
mond's Case.
More's Rep.

By the Statute of 1 *Jac. cap. 11.* it is Felony to marry a second Husband or Wife, the former Husband or Wife living; out of the generality of which Law the Lord Coke makes five exceptions. (1.) It extends not (says he) to any person, whose Husband or Wife is continually remaining beyond the Seas by the space of seven years together; and notice is not material, in respect of the commorancy beyond Sea. (2.) It extends not, when the Husband or Wife shall absent him or her self, the one from the other, by the space of seven years in any parts within his Majesties Dominions, the one of them not knowing the other to be living within that time; here notice is material, in respect the Commorance is within the Realm. (3.) It extends not to any person that at the time of such Marriage is divorced by any Sentence had in the Ecclesiastical Court. (4.) Nor to any person, where the former Marriage is by Sentence in the Ecclesiastical Court declared to be void and of no effect. (5.) Nor to any person, for or by reason of any former Marriage made within the age of Consent.

Co. Inst. par. 1.
c. 27. vid. 22 E.
4. Consultation
5. *Pains Case*
lib. 9. fo. 72.

If the Man be above fourteen, and the Wife under twelve, or if the Wife be above twelve, and the Man under fourteen, yet may the Husband or Wife so above the Age of Consent, disagree to the Espousals, as well as the party that is under the age of Consent: for the advantage of disagreement must be *Reciprocal*. And so it was Resolved by the Judges and Civilians, *Trim. 42 Eliz. B. R.* in a Writ of Error between *Babington and Warner*. So as if either

Co. ubi supra.

Party be within Age of Consent, it is no former Marriage within the Act aforesaid.

Co. ibid.

It is commonly as well as formerly said, that there are two kinds of Divorces, the one that dissolveth the Marriage *a vinculo Matrimonij*; as for Precontract, Consanguinity, &c. The other *a Mensa & Thoro*, as for Adultery, because that Divorce by reason of Adultery cannot dissolve the Marriage *a vinculo Matrimonij*, for that the offence is after the just and lawful Marriage. And the said Statute of 1 Jac. cap. 11. doth in respect of the generality of the words, privilege the Offender (in case of second Marriage, where the former Husband or Wife is living) from being a Felon, as well in the case of Divorce *a Mensa & Thoro*, as where it is *a vinculo Matrimonij*; and yet in the Case of the Divorce *a Mensa & Thoro*, the second Marriage is void, living the former Wife or Husband. And if there be a Divorce *a vinculo Matrimonij*, and the adverse party appeal, which is a continuance of the former Marriage and suspends the Sentence, yet after such a Divorce the party Marrying is no Felon within the said Statute, &c. although the Marriage be not lawful.

(13.) *Alimony*, although it properly signifies nourishment or maintenance, when strictly taken; yet now in the common, legal, and practical sense, it signifies that proportion of the Husbands Estate, which the Wife sues in the Ecclesiastical Court, to have allowed her for her present subsistence and livelyhood, according to Law, upon any such separation from her Husband, as is not caused by her own *Elopement* or *Adultery*. By this *Elopement* is here understood, meant, and intended that voluntary departure of a Wife from her Husband to live with an Adulterer, and with whom she does live in breach of the Matrimonial Vow, whereby she incurs the forfeiture of her *Dower*, unless her Husband upon her free and voluntary submission shall think fit by way of reconciliation to receive her again, and readmit her into the former conjugal relation

(a) St. Westm.
2. cap. 34.

(b) Rot. Claus.
An. 7 H. p. 1.
m. 3.

(c) Supra verb.
Adultery verb.
fin.

(a). In which sense a Woman thus deserting and forsaking her Husband, is said to *Elope*, whereby the Law will not compel him in this case to allow her *Alimony*; on which word Mr. Blunt in his *Nomo-Lexicon* makes mention of an ancient Record (b), wherein the same thing is called *rationabile estoverium*; This *Alimony* the Wife that *Elopes* or departs from her Husband with an Adulterer (though she departed with her Husbands consent) yet loses, together with *Dower* or *Joinsure*, as appears by that remarkable Case of Sir John de Camois before recited (c). And the Husband, from whom his Wife departs, and lives with an Adulterer, shall not be compelled to allow her any *Alimony*.

(14.) Not-

(14.) Notwithstanding the Premises, regularly the Husband is obliged to allow the Wife Alimony *prudens litte, arg. l. si negat. ff. de lib. agnos. & Sancb. de Mat. lib. 2. Disp. 41. nu. 51.* and afterwards in most cases of separation not occasioned by Elopement or Adultery as aforesaid; nor in case of a total Divorce by reason of some legal impediment, whereby the Marriage was Null and void *ab initio dict. Sancb. Tom. 2. lib. 7. Disp. 93. nu. 22.* This Alimony in strictness of Law is a duty properly due from the Husband to the Wife whilst she cohabits with him; for by the Canon Law if without any default of his, she does of her own accord depart from him, he is not obliged to allow her Alimony during such her wilful deserting of him, though she be not charged of Adultery. *c. hæc imago 33. q. 5.* It being a rule in Law, *Qui non facit quod debet, non recipit quod oportet.* *l. si ea C. de Condit. insert. & l. Julian 6. affinis ff. de acti. empt.* But if she depart by reason of some default in him, as because of Cruelty or the like, in that case he shall be compelled to allow her Alimony; for the Law understands her as a dutiful Wife, so long as it is attributable only to him and no way imputable to her, that she is constrained to seem otherwise, *arg. l. jure civili. ff. de Cand. & demonst. & Lynn. l. qui in uxorem c. de Neg. gest. nu. 1. & D. D. Communiter.* But if she depart of her own default, the Husband is not obliged to allow her Alimony, albeit he had a considerable Dowry with her: and on the other side, if the Husband be in the fault, and she depart from him, he is obliged to allow her Alimony, though he had nothing with her. *Jo. Lupus c. pro vestras de Donat. int. vir & ux. Barbosa. 2. p. rubr. ff. solut. matr. nu. 43.* And in case it be doubtful, through whose default it is, that they live asunder, the Law in that case concludes, that the party that was last in fault, is not least in fault. *l. illud. 17. ff. de peric. & commod. rei vendit.* And therefore if the Wife, who by her own default did voluntarily depart from her Husband, shall after repent, and submitting her self to him, shall desire reconciliation, and to be admitted to cohabitation with him, he then refusing her shall be obliged to allow her Alimony, save in the Cases aforesaid. *Glos. c. significasti. verb. materiam in fide Divort. ubi Host. nu. 2. verb. restituti. Jo. Andr. nu. 7. fi. & D. D. Communiter.* On the other side, if by reason of the cruelty of the Husband the Wife shall blamelessly flee from him, and the Husband shall offer sufficient security or caution for his future good Behaviour to her, and her safety and peace with him, and the cruelty or ill usage not such, but that by such caution the Wives peace and safety may be undoubtedly secured, and she notwithstanding refuse to return, in such case the Law will not compel him to allow her Alimony. *Quia ultima ea culpa uxori nocet. Ferrer. concil. 34. nu. 18. Barbosa. 2. p. ff. solut. matrim. nu. 44.*

(15.) By the Civil Law, if a Dowry or Marriage-Portion with a Wife be promised and not paid to the Husband, he is not obliged to allow her Alimony; *Gloss. Auth. de non eligend. secundo Nubentes*. The reason whereof is, because such Portion *quasi in pretium datur*; *l. pro oneribus, c. de jur. Dotum*. But if by reason of some misfortune, her Parents or such as undertook for the Payment thereof, do after become insolvent, she shall notwithstanding have Alimony, even by that Law, which in other respects seems somewhat severe in this Point, unless you can affect them with Fraud in promising what they knew they could not perform. *Barbos. ff. solut. Matri. nu. 71*. Or in case two persons lay claim to the same Woman, each pretending she is his Wife by Marriage, and the one of them move to have her kept under Sequestration till the Case be decided; in this case she shall have Alimony *pendente lite* of that Person at whose motion or instance she is so sequestered. *l. si pro lusorio. ff. de appollat*. But if the controversy be only between a Man and a Woman, touching the validity of a Marriage, as whether a Marriage or not: in such Case no Alimony is due, till some Matrimonial Proof appear, or that it doth some way *constare de Matrimonio*; but wherever a Marriage doth appear, there Alimony shall be due *pendente lite*; *arg. l. si neget. ff. de lib. Agnosce*.

(16.) *John Owen* lived apart from his Wife: And upon Petition of the Wife to the Justices of *Assise* for Maintenance, they refer'd it to the Bishop of *Bangor*, who ordered that he should pay to his Wife 10 *l. per An.* which was afterwards confirmed by Decree in the Council of *Marches of Wales*. And because that *John Owen* disobeyed that Decree, and did not pay 10 *l. per Ann.* the Council sent a Messenger to apprehend his Body, and caused his Goods and the Profits of his Lands to be Sequestered. And *Henden* prayed a Prohibition: For that Alimony was not within their Instructions. *Richardson* demanded of him, if they could grant Prohibitions, if they meddle with a thing which belongs to Ecclesiastical Power, where they themselves have Power. *Harvey* was of the same opinion, for this Court should preserve other Courts in order. *Yelverton* said, for the Sequestration of the Lands, they could not do that. *Richardson*, they have not any power to sell the Goods. The Ecclesiastical Court is the proper Court for Alimony; and if the Person will not obey, they cannot but Excommunicate him. And by *Yelverton*, when that comes to them from the Bishop to be confirmed, they cannot but walk in the Steps of the Bishop; and a day was given to shew why a Prohibition should not be granted: and so it was ruled (1).

(1) Mich 8 Car.
C.B. *John Owen*
Case *Hutley's*
Rep.

(17.) Dame Sherley Wife of Sir Henry Sherley sued in the High Commission Court for Alimony, and Hitcham moved for a Prohibition; and said that Alimony is not within the Jurisdiction of the High Commission; for the Court of High Commission is to try *Ardua Regni*, which are not triable by the Common Law. Richardson, the Power of the High Commission is not *de Arduis Regni*, but of *Heresies*, and such other things Ecclesiastical; and he said, that the Court of High Commission had special words in their Commission, but not in the Statute of *primo*; and that the Statute *de primo* had no Prerogative in that; and so the Question is, if the King may by the Common Law grant such a Commission. Hutton said, that by the same reason as he may grant such a Commission, they may grant Commissions for all other things. Yelverton, I marvel how that came within their Commission: he said that *in tempore Jacobi*, upon a debate before him, Sir Edward Coke so fully satisfied the King. And this matter of Alimony was commanded to be put out of their Commission. And upon that Richardson said to Hitcham, move this again when the Court is full, for we may advise of this — *Et adjurnat.* &c. (†) One Broke was committed by the High Commissioners to the Fleet, because he refused Alimony to his Wife, and that being returned upon an *Habeas Corpus*, he was delivered. — *Broke's Case. More's Rep.*

(†) Dame
Sherley's Case.
Hutley's Rep.

(18.) The Wife complains against her Husband in the Ecclesiastical Court *Causa servitiæ*, for that he gave her a Box on the Ear, and spit on her Face, and whirled her about, and called her damned Whore: Which was not by Libel, but by Verbal accusation, after reduced to writing. The Husband denies it, and the Court ordered the Husband to give to his Wife 4*l.* every week, *pro expensis litis* and Alimony. Barkley and Henden moved for a Prohibition. The Suit is originally *Causa servitiæ*, and as a Case wherein they Assess Alimony. And now for a ground of a Prohibition, it was said that the Husband chastised his Wife for a reasonable cause, as by the Law of the Land he might; which they denied and said, that they had Jurisdiction in these matters *de servitiæ*, &c. And afterwards that the Wife departed, and that they were reconciled again. And then that reconciliation took away that *Servitiæ* before, as reconciliation after Elopement. Richardson, it was said here, that the Suit was without Libel, but that is no ground of a Prohibition, for the proceeded upon that matter reduced in Articles, and we cannot grant a Prohibition if they proceed in their Form; For we are not Judges of their Form. But if they will deny a Copy of the Libel, a Prohibition lies by the Statute. You say, that an Husband may give reasonable chastisement to his Wife, and we have nothing to do with it: But only that the Husband may be bound to his good Behaviour by

by the Common Law. And the Sentence in *causa servitiae* is a *Mensa & Thoro*, and we cannot examine what is Cruelty, and what not. And certainly the matter alledged is Cruelty; for *spitting in the Face* is punishable in the *Star-Chamber*. But if the Husband had pleaded a Justification, and set forth a Provocation to him by his Wife, to give her a reasonable castigation, then there would be some colour of a Prohibition. *Hewden*, we have made such an Allegation, and it is absolutely refused. *Hutton*, perhaps he is in contempt, and then they will not admit any Plea; as if one be Outlawed at Common Law he cannot bring an Action. But they advised the Plaintiff to tender a Justification, and if they refused it, then to move for a Prohibition (*).

(*) The Wife
of Mr. Clobery
against her
Husband.
Hutley's Rep.

(19.) B. was ordered by the High Commission Court to give Alimony to his Wife, and was bound in an obligation of 300 l. to one of the Doctors there, to give her Alimony, and to use her as his Wife; And now he is sued there again, and it is alledged against him that he had committed Adultery with divers Women, and that he had not given Alimony to his Wife, and thereupon B. was put to his Oath, who answered, that as to the point of Alimony he was not bound to answer, for that he was bound in an obligation to perform it, and also that he was sued to discover upon his Oath the Forfeiture of the Obligation, and for that the Defendant would make no other answer, he was committed to Prison, and being brought hither by *Habeas Corpus*, the Court was prayed that he might be released for the reason aforesaid. *Coke*, *Gawens Case* which was ruled here in *Wrays* time, was the same Case in effect, and it was ruled that the Ecclesiastical Court may not examine him upon his Oath in such Case, and *per Curiam* B. was Bailed till the next Term, for that that was the last day of the Term. *Coke*, for that there is an obligation taken in this Case, I will grant a Prohibition for taking an Obligation for that, if it be moved, and it was not well done to take the obligation to one of the Doctors, but we use to take the obligation in the Kings Name, *Mieb. 5 E. 4. B.R. Rot. 143*. The Statute of 2 H. 4. gives Authority to Bishops to Fine and Imprison for *Herésie*; and where one *Reßer* had given a Legacy to Bishop *Stephens*, for which he sued the Executor, who being for not payment thereof Excommunicated, said that he was not Excommunicated before God, although he were before Men, for his Corn grew very well; for which words he was after Imprisoned, but he was Bailed here *per Curiam* upon an *Habeas Corpus*, for that it was not *Herésie*, because that Court had Authority to examine such things which are given by the Statute of 10 H. 7. One said that the Tenth part of Tithes was not due *Jure Divino*, for which words he was Imprisoned, whereupon the

Habeas

Habeas Corpus was brought, and that depended till 14 H. 7. at which time it was adjudged that it was not *Hereſie*, and that the Court had Jurisdiction to examine that, it being given by Statute. And it ſeems to me that the *High Commiſſion* Court had no power to Fine or Imprison for Alimony. *Hill 12 Jac.* upon an *Habeas Corpus* by one *Cod*, the return was that he was Imprisoned by the *High Commiſſion* by that Warrant, viz. *We command you to take him and Imprison him for manifest Contempt of the Court, for that he being ordered to receive his Wife, and to enter into an obligation to use her as his Wife, he refuses so to do. Coke, he shall be Bail'd, for that he could not be imprisoned by them for Alimony, nor take obligation to perform their order.*

*Mich. 12 Jac.
B.R. Bradſton's
Caſe. Rolls Rep.*

Sentence was given in the Ecclesiastical Court, that the Wife should be separated from her Husband, *propter ſcandalum* of the Husband, and Alimony allowed her there: the Husband prayed a Prohibition, ſetting forth he deſired a *Cohabitation*, and profered a *Caution* thereby to use her ſilly. The Court denied it, becauſe the Court of the Ordinary is the proper Court for Allowance of Alimony.

*Hill. 12 Jac. B.
R. Hyatts Caſe.
Cro. p. 2.*

A Libel was before the High Commissioners, which ſuppoſed divers cruelties uſed by the Husband againſt the Wife: for which ſhe was enforced to depart from him, who would not allow her maintenance, and therefore ſhe ſued before them for Alimony; But becauſe it is a Suit properly ſuable before the Ordinary, wherein if there be wrong, the party may have an Appeal; and although it be one of the Articles within their Commiſſion to determine of; yet becauſe it is not any of the Clauſes within the Statute of 1 E. 6. for which Cauſes the Commiſſion is ordained, the Court awarded a Prohibition.

C H A P. XXXVII.

Of Defamation.

1. *What Defamation is; how many ways it may be; and where Cognizable.*
2. *Two ways of prosecution at the Civil Law in Causes of Defamation.*
3. *Prohibition for suing in the Ecclesiastical Court upon the words [Drunkard and Drunken Fellow.]*
4. *Several differences in reference to the Cognizance of the Temporal and Spiritual Courts in point of Slander.*
5. *Whether Action lies for calling one Quean?*
6. *Prohibition for suing in the Ecclesiastical Court for words tending to the obstruction of a Marriage.*
7. *Matters determinable at Common Law, not Cognizable in the Ecclesiastical Courts.*
8. *Whether these words [Thou hast taken a false Oath] be Actionable, and in what Court?*
9. *Whether Action lies at Common Law, for saying Thou art a Whore, &c.*
10. *Words of Slander to the hindrance of Marriage, are Actionable at the Common Law.*
11. *Defamatory words [Thou art a Bawd and keepest a Bawdy House.] whether and where Actionable?*
12. *To say A. is a Cuckold, and that B. had lain with the Wife of A. is a Defamation suable in the Spiritual Court.*
13. *The difference as to Cognizance between the words [Thou art a Bawd, and I will prove thee a Bawd] and the words [Thou keepest a House of Bawdry.]*
14. *To say [Thou art a Drunkard or a Drunken Fellow] whether such words are suable in the Ecclesiastical Court?*
15. *The words [he is a Cuckoldy Knave] are suable not in the Temporal, but in the Ecclesiastical Court.*
16. *Whether the calling of Pimp, Common Pimp, be Actionable, and in what Court?*
17. *Welch Jade, expounded to be Welch Whore, and cognizable in the Ecclesiastical Court.*
18. *Whether the words Quean or Base Quean, be Actionable in the Ecclesiastical Court?*

19. *Action in that Court for Scandalizing a Parson.*
20. *Whether Action lies in the Ecclesiastical Court, for saying of one that kept a Victualing house, that she kept a House of Bawdry.*
21. *Whether the words [Thou art a Pander] be actionable at the Common Law?*
22. *Church-wardens presentment of a Feme Covert upon a Common Report for Adultery, an Action of Defamation brought in the Ecclesiastical Court thereon.*
23. *Whether Action upon the Case for words lies against an Infant of seventeen years of age?*
24. *Several other Cases at the Common Law pertinent to this subject of Defamation; what of them cognizable in the Ecclesiastical Court; and wherein the Prohibition lies or not.*

(1.) **D**EFAMATION, properly so called, is the utterance of reproachful Speeches, with intent of raising an ill Fame of the party so reproached; *Defamare, est in mala Fama ponere: Bart. l. turpia. ff. de Legat. 3.* This extends it self to *Writing*, as by defamatory Libels; as also to *Deeds*, as by reproachful Postures, Signs and Gestures; *Lind. c. autoritate. verb. quicumque. in gloss. de Sent. Excommunicat.* And as for the most part it proceeds of *malice*, implying matters either of *Crime* or *Defect*, so it generally aims at some prejudice or damage to the party *defamed*. Whatsoever Cognizance the Temporal Laws of this Realm do take of *Defamations* by vertue of Prohibitions and Actions upon the Case; yet it will not be denied, but that the Cognizance of *Defamations*, where they are duly prosecuted, doth properly belong to the Spiritual Law, specially where the matter of the Defamation is only Ecclesiastical.

(2.) In all causes of Defamation the party *defamed* had his Election by the Civil Law, whether he would prosecute the *Defamer ad Vindictam publicam*, or *ad privatum interesse*; the former whereof was made choice of, where the defamed aimed more at the Defamers shame, than his own Interest; and chose rather to reduce him to a Recantation, than augment his Cash by his own Credits diminution; *l. in constitutionib. §. ult. ff. L. Cornel.* The other, *viz. ad privatum interesse*, was chosen by such defamed ones as valued their Credit at a certain Rate, and chose rather a Pecuniary Compensation, than an unprofitable Recantation; aiming more at their own private satisfaction, than at the Defamers publick disgrace. *l. stipulationem. §. plane. ff. de verbor. obligat. & l. si quis ab alio. ff. de re judic.* But, both of these the

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All Actions of Defamation suppose in aditu quam pro palavit, &c. Case Barrow against Lewelling, Hob. Rep.

Defamed could not have; for having determined his Election, he was therewith to rest satisfied; only having obtained a Sentence against the Defamer, for his recantation or publick disgrace by prosecuting him *ad publicam vindictam*, he might possibly have in Lieu thereof a pecuniary Recompence by way of Commutation. The Prosecution *ad publicam vindictam* was left to the determination of the Ecclesiastical Jurisdiction, the other to the Cognizance of the Secular: Much in conformity to what the Laws of this Realm in Cases of Defamation seem to say, *viz.* where the Prosecution is merely for the punishment of Sin, and Money not demanded, there the Spiritual Court shall have the Cognizance; But where Money is demanded in satisfaction of the Wrong, there the Temporal; specially if the Defamer undertake to justify the matter, or the words express or imply a crime belonging to the Cognizance of the Common Law. These Actions of Defamation are of a higher Nature, than they seem *primo intuitu* to be (a Mans good Name being Equilibrious with his Life;) and therefore the Law calls them *Actiones prejudiciales*, that is, such as draw lesser Causes to them, but themselves are drawn of none.

Vid. Stat. 2.
E. 3. c. 11.

(3.) One libelled against another in the Ecclesiastical Court, for saying *That he was a Drunkard, or a Drunken Fellow, and an idle Drunken Fellow*, and by the opinion of the whole Courta Prohibition was granted, and for such words a Prohibition was granted in C.B. in the Case of *Martin Calthrop* (e).

(e) Mich. 8.

Car. B.R.

Cuckowes Case
Jones Rep.

(4.) One moved at the Bar for a Prohibition to the Ecclesiastical Court on a Suit there depending for calling one *Bawd*. *Jones* Justice conceived, that these Differences ought to be observed, where a Man calls a Woman *Whore*, or such like Slander, for which Suit lies in the Ecclesiastical Court against the party (if the matter appear) in that Case Suit lies for Slander there, and no Prohibition lies; *e contra*, if a Man be called *Thief*, *Traitor*, or the like, whereon no Suit lies for the Principal in the Ecclesiastical Court; but at the Common Law, if one be sued for such Slander in the Ecclesiastical Court, a Prohibition lies. If a Man call one *Bawd*, for which Suit lies at the Spiritual Court and also at the Common Law; there if the Suit be for Slander in the Ecclesiastical Court, in that case no Prohibition lies, for the party hath Election to sue in which Court she please: So if a Woman be Slandred in her Reputation, whereby she is hindred in her Marriage; she may sue either at the Common Law or in the Spiritual Court for Slander. And lastly, if a Man speak any words, for which no Suit lies at Common Law, nor are such as concern any thing whereof the Ecclesiastical Court takes Cognizance, it seems that in such Case if Suit be in the Spiritual Court for *Slander*, as for

for *Convictia*, a Prohibition lies, as for calling one *Knave*, *Drunkard*, or the like. *Quere* of that, the Chief Justice agreed to that; the others said nothing therein (f).

(5.) A Suit was commenced in the Ecclesiastical Court, where the Libel was, that he called the Plaintiff *Queen*, or words to that effect, or importing the same Sense; in this Case a Prohibition was granted: (1) Because no Action lies for that Word *Queen*.

(2) For the uncertainty thereof (g).

(6.) The Defendant said to one *Anthony Elcock* (who was a Suiter to the Plaintiff, and with whom there was near an Agreement of Marriage) *I know Davies Daughter well, she did dwell in Cheapside, and a Grocer did get her with Child*, and the Plaintiff declared, that by reason of these Words, *Elcock* refused to take her to Wife. Adjudged, that the Action would lie at the Common Law, and the Suit was not to be in the Spiritual Court for Defamation, but at the Common Law, for that she is prejudiced in that which should be her *Temporal* advancement; and the ground of the Action is *Temporal*. The truth of the Case was this: an Action upon the Case for a Slander was brought by *Ann Davies* against *John Gardiner*: That whereas there was a Communication of a Marriage to be had between the Plaintiff and one *Anthony Elcock*; the Defendant to the intent to hinder the said Marriage, said and published, that there was a Grocer in *London* that did get her with Child, and that she had the Child by the said Grocer, whereby she lost her Marriage. To which the Defendant pleaded *Not Guilty*, and was found guilty at the Assizes at *Aylsbury* to the damages of Two hundred Marks; and now it was alledged in Arrest of Judgment, that this matter appeareth to be merely Spiritual, and therefore not determinable at Common Law, but to be prosecuted in the Spiritual Court. But *per Curiam*, the Action lies here, for a Woman not married cannot by intendment have so great advancement as by her Marriage, whereby she is sure of maintenance for her life, or during her Marriage, and Dower and other Benefits which the Temporal Laws give by reason of her Marriage; and therefore by this Slander she is greatly prejudiced in that which is to be her Temporal advancement, for which it is reason to give her remedy by way of Action at Common Law: as if a Woman keep a Victualing-House, to which divers of great credit repair, whereby she hath her livelyhood; and one shall say to her Guests, that as they respect their Credits, they take care how they use such a House, for there the Woman is known to be a *Bawd*, whereby the Guests avoid the House, to the loss of her Husband: shall not she in this Case have an Action at Common Law for such a Slander? It is clear that she

(f) Trin. 2.
Car.B.R. A-
nonymus.
Jones Rep.

(g) Anony-
mus. Litch-
Rep.

shall. So if one saith, that a Woman is a *Common Strumpet*, and that it is a Slander to them to come to her House, whereby she loseth the advantage that she was wont to have by her Guests, she shall have her Action for this at Common Law. So here upon these collateral Circumstances, whereby it may appear that she hath more prejudice than can be by calling of one *Harlot*, and the like. And judgment was given for the Plaintiff (b).

(b) *Davis* vers.
Gardner. Poph.
Rep.
Vld. dist. Caf.
Co. Lib. 4. 16.
35 Eliz.

(i) 25 Eliz.
Palmer and
Thorp's Case.
Co. 4. par. 20.

(7.) Touching Defamation, for which Suit is in the Ecclesiastical Court. Resolved, the matter must be meer Spiritual and determinable only there; for if it concern any matter which is determinable at the Common Law, the Ecclesiastical Judge hath not the Cognizance thereof (i).

(8.) Action was for these words, *Pierce hath taken a false Oath in the Court of Consistory of Exeter*. It was objected, that for matters in the Spiritual Court, an Action will not lie: And the Statute of 5 Eliz. of *Perjury*, doth not extend to those Courts: But it was resolved, that the Action did lie for these words, and that the Statute doth extend to such and the like Courts; as the Court of *Star-Chamber*, &c. And the words, *that he hath taken a false Oath*, shall be intended actively, and shall amount to these words; *He is forsworn*. In this Case it was said by *Bridenice*, that these words, are actionable, although the *Perjury* be supposed to be committed in the Spiritual Court; for he shall be Excommunicated: if he will not appear, and he shall do Penance in a white Sheet, which is as great a disgrace as to be set upon the Pillory. And it was ruled in an Action upon the Case betwixt *Dorrington* and *Dorrington*, upon these words; *Thou art a Bastard*, that an Action lieth, and yet *Bastard* is a Spiritual matter, and there determinable; so for these words, *Thou art a Pirate*, an Action lieth, and yet *Piracy* is not punishable by the Common Law, but in the Court of Admiralty. And these words, *He hath taken a false Oath*, do amount to these words, *He is forsworn*. *Wray* conceived, that the words are not actionable, for there is a Proviso in the Statute of *Eliz. cap. 9.* that the said Act shall not extend to any Ecclesiastical Court, but that every such Offender shall be and may be punished by such usual and ordinary Laws as heretofore have been, and are yet used, and frequent in the said Ecclesiastical Court. *Gawdy*, upon these words, an Action doth not lie, for they are not pregnant of any *Perjury* in the Plaintiff, for he may be meer passive in it: for if one of the Masters of the *Chancery* Minister an Oath to any person, or any Commissioners, &c. and the Plaintiff sweareth falsely, a Man may say that the Master of the *Chancery*, or the Commissioners have taken a false Oath: and yet he is not guilty of falsity. And afterwards *Mutata Opinione Wray*, that the Proviso in the said Statute is to this

this intent, such an offence may be enquirable and examined in the Ecclesiastical Court in such manner as was before, but the same doth not take away or restrain the Authority of the Common Law, but that such an Offence may be here examined, &c. And as to the later exception upon these words (*he hath taken a false Oath*) it shall be intended Actively, and not Passively; and if so, the Defendant ought to have so pleaded it: And afterwards Judgment was given for the Plaintiff (k).

(9.) Pollard and his Wife brought an Action against Armshaw for these words, viz. *Thou art a Whore, for J. S. Goldsmith hath the use of thy Body, and the Cart is too good for thee. Per Curiam*, the Action will not lie; for the Common Law cannot define, who is a Whore; but where if one keep a Victualling house, it be said he keeps a House of Bawdry, an Action will lie (l).

(10.) Action upon the Case for words of Defamation. Whereas the Plaintiff was a Person of good Fame, and always free from Adultery and Fornication, &c. And after the death of Brian her late Husband, was in Communication with one Cowley for a Marriage betwixt them; That the Defendant to deprive her of her Fame, and to hinder her from the said Marriage, spake of the Plaintiff these words, viz. *She is a Whore, and her Children (innuendo her Children which she had by the said Brian late her Husband) are Frambishes Bastards (innuendo one Nicholas Frambish)*. After Verdict upon Not Guilty, and found for the Plaintiff, it was moved in Arrest of Judgment by Grimston, that these words are not actionable: For, for calling Whore, there lies not any Action; and to say that her Children by her former Husband are Frambishes Bastards, is repugnant in it self; for they cannot be Bastards, which were born in the time of her former Husband: But all the Court held that the Action well lies. For to say of a Widow who is in Communication of Marriage with another, that she plaid the Whore in her former Husbands time, is a great discredit: And to say that her Children are Bastards (although in truth they cannot be Bastards in Law, yet in Reputation they may be so) is cause of loss of her Marriage, and that none will Marry with her; wherefore it was adjudged for the Plaintiff (m).

(11.) Action upon the Case. Whereas he keepeth an Ale-house Licensed by Justices of the Peace, that the Defendant to scandalize the Plaintiffs Wife, spake these words of her, *Hang thy Bawdy, Thou art worse than a Bawd: Thou keepest a House worse than a Bawdy House, And thou keepest a Whore in thy House to pull out my Throat*. Upon not guilty pleaded, found for the Plaintiff. Stone moved in Arrest of Judgment, that these words are not actionable; but agreed, that for saying, *One is a Bawd, and keeps a Bawdy House,*

(k) Hill. 32.
Eliz. Rot. 434.
B.R. Pierce
vers. Howe
Leon. Rep.

(l) 40 EL. B.R.
Pollard and his
wife against
Armshaw.
Gold. 172.

(m) Mich. 9.
Car. B.R. Doro-
thy Brian vers.
Cockman Cro.
Rep.

House, Action lies, because it is a temporal Offence, for which the Common Law inflicts punishment. But to call one *Bawd* without further speaking, an Action lies not, no more than to call one *Whore*. But it is a Defamation punishable in the Spiritual Court. And to say, *That he keeps a House worse than a Bawdy House hath* not any intendment what he means thereby; wherefore the Action lies not: And if it be intended, that such words should hinder Guests from coming thither, being an Alehouse, the Husband only ought to have brought the Action. And as to that, the Court (*absente Richardson*) agreed. But for the other words, they held the Action lies by the Husband and Wife, for the slander to his Wife; and it is as much as if he had said, that she keepeth a Bawdy house; wherefore it was adjudged for the Plaintiff (*n*).

(*n*) Trin. 9. Car.
Perkins and his
Wife against
Goody. Cro.
Rep.

(12.) A Prohibition was prayed, because *A.* and his Wife sued in the Ecclesiastical Court for Defamation, and speaking these words of the Plaintiff, *He was a Cuckold and a Wittal, which is worse than a Cuckold, and that Ayllworth had layen with Ayloffs Wife; And for these Defamatory words he sued there; and because it was alledged; that for these words, being but words of Spleen, Prohibitions had been usually granted; day was thereupon given until this Term, to shew cause why a Prohibition should not be granted; and divers presidents were shewed, that for calling one Cuckold or Whore, Prohibitions have been granted: But now upon advertisement all the Court agreed, that no Prohibition should be granted, but that the Ecclesiastical Court should have Jurisdiction thereof: For although they agreed, that there ought not to have been any Suit for the first words, they being too general; yet being coupled with a particular, shewing that the Wife committed such an Offence with such a particular person, they be not now general words of spleen in common and usual discourse and parlance; But they held it was a Defamation liable in the Spiritual Court; whereupon the Prohibition was denied (*v*).*

(*v*) Pasch. 4.
Car. C. B. Eaton
vers. Aylliff and
his Wife. Cro.
Rep.

Brownlow chief Prothonotary produced on that occasion several presidents, where Prohibitions had been granted to stay Suits for such words, *viz.* Trin. 15. Jac. rot. 2260. *Purchas* vers. *Birrel* for that he was presented at several Inquests within his Parish for being a *Drunkard*, and a *Barretor*. And Pasch. 6. Jac. Rot. 397. Prohibition to stay a Suit for calling a *Parson Hedge-Priest*. And Mich. 21. Jac. *Barker* vers. *Pasmore*: *She is a Queen, and a tainted Queen*. Prohibition granted.

(13.) *H.* prays a Prohibition to stay a Suit in the Spiritual Court for Defamation for speaking these words, *Thou art a Bawd, and I will prove thee a Bawd*. And because these are words properly determinable in the Spiritual Court, and for which no Action lies at the Common Law, a Prohibition was denied. But for saying, *Thou* keepeth

keepers a House of Bawdry, this being matter determinable at Common Law by Indictment. Suit shall not be in the Spiritual Court (p). *vid.* 27 H.8. and Co. lib. 4. fol. 20.

(14.) Prohibition was prayed to the Ecclesiastical Court to stay a Suit there for Defamation, for these words, *Thou art a Drunkard or a Drunken fellow*. And by the opinion of Croke, Jones and Berkeley a Prohibition was granted: For these words do not concern any Spiritual matter, but merely Temporal; and they be but *Conversations Temporales*, and a common Phrase of bawling, for which there ought not to be a Suit in the Spiritual Court; and so it was held in *Martin Culbopp's Case*, in C.B. but *Richardson* doubted thereof, because the Spiritual Court as well as the Temporal may meddle with the punishment of Drunkenness; so it is not merely Temporal; But he assented to the grant of a Prohibition, and the party may (if he will) demur thereto; whereupon a Prohibition was granted (q).

(15.) Prohibition was prayed by *Bullbrook* for *Gobbet*, to stay a Suit in the Spiritual Court for Defamation, in speaking these words, *He is a Cuckoldly Knave*; and cited presidents, that for saying, *He is a Knave and a cheating Knave*. Suit being in the Spiritual Court, a Prohibition was granted upon good assentment; and the Court said, that president is not like to this Case, for there was not any offence wherewith the Spiritual Court ought to meddle, but in this Case for these words, it is properly to be examined and punished *theri pro reformatione morum*; for it is a disgrace to the Husband as well as to the Wife, because he suffers and connives at it; whereupon (*absente Richardson*) the Prohibition was denied. Again, it was moved, that this should be granted upon the Statute of 3 H.8. because he was sued in the Court of the *Arches*, which is in the Archbishops Jurisdiction, and the words were spoken at *Tisburyworth* in *London* Diocese, as appeared by the Libel. But *Jones* said that he was informed by *Dr. Duck* Chancellor of *London*, that there hath been for long time a composition betwixt the Bishop of *London* and the Archbishop of *Canterbury*, that if any Suit be begun before the Archbishop, it shall be always permitted by the Bishop of *London*; so as it is quasi a general License, and so not sued there but with the Bishops assent; and for that reason the Archbishop never makes any Visitation in *London* Diocese. And hereupon also the Prohibition was denied (r).

(16.) *Action* for that the Defendant had said of and to the Plaintiff, being of good fame, and one who had served as Captain in the Wars *hæc verba* in *London*, *Thou art a Pimp*, averring that in *London* that word was known to be intended a *Bawd*, and further said, *That he was a common Pimp, and notorious, which he would justify*

(p) Mich. 7.
Car. B.R.
Holingsheads
Case. Cro. Rep.

(q) Mich. 8.
Car. B.R.
Cucko verf.
Starre. Cro.
Rep.

(r) Hill. 9. Car.
B.R. *Gobbits*
Case. Cro. Rep.
par. 3.

justise. After Verdict for the Plaintiff, *Littleton* (the Kings Solicitor) moved in Arrest of Judgment, that these words are not Actionable; for it is a meer *Spiritual Slander*, as *Whore* or *Heretick*, and punishable in the Spiritual Court, and not at the Common Law; and he said, that divers times Suits have been in the Spiritual Court for such words and Prohibitions prayed and never granted. *vid.* 27, *H.8.14.* But to say that he keeps a *Bawdy house*, is presentable in the *Leet*, and punishable at the Common Law. *Ward, a Contra*, because it is spoken of one of an honourable Profession, *viz.* a *Souldier*, and trenches on his reputation to be taxed with such a base Offence; and he said, that such Offences have been divers times punished in *London* by corporal punishment, but it was answered, that was by Custom, and there the calling one *Whore* is actionable. *Jones* Justice held that the Action lay not, and all the Justices agreed, that the exposition and averment (that *Pimp* is known to be a Name for a *Common Bawd*) is good. *Croke* and *Berkley* agreed, that the words are very scandalous, and more than if he had call'd him *Adulterer* or *Whoremonger*, &c. and may be indicted and punished for it corporally, as tending to the breach of the Peace; and rule was given that Judgment should be entered, &c. But was afterwards staid

(s) Mich. 10.
Car. rot. 148.
Dymock vers.
Fawcett Cro.
Rep.

(s) Mich. 10. (17.) Suit being in the Ecclesiastical Court for calling a Mans Wife *Welch Jade* and *Welch Rogue*, Sentence being there in the *Arches*, the Defendant appealed to the Court of *Audience*; and in the Appeal interlined the former words, and in the Libel was interlined [*and a Welch Thief*]; and hereupon a Prohibition was prayed and granted, unless cause were shewn by such a day to the contrary: For it was held clearly, that for the word [*Welch Thief*] Action lies at the Common Law, and they ought not to sue in the Spiritual Court: And for the other words, it was conceived upon the first motion, they ought not to sue in the Spiritual Court, for they be words only of Heat, and no Slander. But it was afterwards moved and shewn, that the said words [*A Welch Thief*] were not in the first Libel, nor in the Appeal in the time of the Appeal; but were interlined by a false hand without the privity of the Plaintiff in the Ecclesiastical Court, and that upon Examination in that Court, it was found to be falsely inserted, and ordered to be expunged. And that the words *Welch Jade* were shewn in the Libel to be expounded and so known to be a *Welch Whore*; which being a Spiritual Cause and examinable there, it was therefore prayed that no Prohibition should be granted; and if it were granted, that a *Consultation* should be awarded. And of this Opinion was all the Court, that the words [*and a Welch Thief*] being

being unduly interlined, and by Authority of the Ecclesiastical Court expunged, and in that Court *Fade* is known and so expounded for a *Whore*, our Law gives Credence to them therein, and especially being after two Sentences in the Spiritual Court. This Court will not meddle therewith. Wherefore Consultation was granted, if any Prohibition was issued forth *quia improvide*; and Rule given, that if a Prohibition was not passed, that none should be granted (r).

(18.) It was moved for a Prohibition by *Harris* Serjeant to the Court of Audience, because that the Plaintiff was sued there for saying to one, *Thou art a common Whore and a base Quean*: and *Harris* said, that a Prohibition had been granted in this Court, for saying to one that she was a *pimperly Quean*: And it was the Case of *Man* against *Huckster*: And *Finch* said, though the words are not Actionable in our Law, yet they are punishable in the Spiritual Court, for the word *Quean* in their Law implies as much as *Whore*: But *Hobert* said, that this word *Quean* is not a word of any certain Sense, and is to all intents and purposes an *Individuum Vagum*, and so incertain (s).

(19.) In an Action upon the Case; that whereas he is Parson of *D.* and a Preacher, the Defendant Slandered him in *hec verba*, *Parett is a lewd Adulterer, and hath had two Children by the Wife of J. S. I will cause him to be deprived for it.* By the Court the Action doth not lie; For the Slander is to be punished in the Ecclesiastical Court: And so awarded *Quod Quer. nil cap. per bill.* (x).

(20.) *D.* had sued *T.* in the Ecclesiastical Court for this, *viz.* That whereas she was of good Fame, and kept a Victualling-House in good Order; that the said *T.* had published that *D. kept an house of Bawdry.* *T.* now brought a Prohibition, and by the Court well; for *D.* might have an Action for that at the Common Law; especially where she kept a Victualling-House as her Trade. Note, 27 H. 8. 14. And by the Justices, that the keeping of a *Brosel-house* is inquirable at the *Leet*; and so a Temporal Offence. And so was the Opinion of the Court, *Tr. 7 Car. B. R. Mrs. Holland's Case* (y).

(20.) *W.* sued *L.* in the Ecclesiastical Court for a Defamation, and had Sentence; *L.* Appeals, and depending the Appeal comes a Pardon, which relates to the Offence, and pardons it; then *L.* defers his Appeal, and for that *W.* had costs taxed him: And now *L.* prayed a Prohibition, because he defer'd his Appeal because of the Pardon, which had taken away the Offence. And by the Court in that Case, after the pardon the inferior Court cannot tax costs; but it was urged that the superior Courts might tax costs upon the desertion of the Appeal, which is an Offence after the Pardon. But it was an-

(r) Pasch. 12
Car. C. B. *Pew*
and his Wife
verf. *Jiffrys.*
Cro. Rep.

(s) Trin. 19
Jac. C. B.
Winch. Rep.

(x) Case.
Parett verf.
Carpenter.
Noys Rep.

(y) *Thorne*
against *Alice*
Darham.
Noys Rep.

swered on the other side, that it was in vain to prosecute the Appeal, when the Offence it self is pardoned. The words were, *Thou art a Pander* to Sir *Hen. Vaughan*: And there was much debate if they were Actionable at Common Law; yet it was agreed, that a Suit may be brought for them in the Spiritual Court, as for calling one *Whore*, *Bawd*, or *Drunkard*. But otherwise by *Jones*, if he had said, *That he was Drunk*; for then a Prohibition lies. And it was ruled in 6 *Jac. B. R.* in the Case of *Cradock* against *Thomas*; a Prohibition was granted in a Suit for calling one *Whoreson*. And in *Weeks* Case, a Prohibition in a Suit for calling one *Knave* (z).

(z) Case *Lewis*
against *Whit-*
son. *Noy's Rep.*

(22.) *E.* and *M.* being reputed Church-wardens (but they never took any Oath, as the Office requires) present a Feme Covert upon a common report for Adultery, &c. And the Husband and Wife Libel against them in the Ecclesiastical Court for that Defamation. And when Sentence was ready to be given for them, the Church-wardens Appeal to the *Archb.* where the Presentment was proved but by one *Witness*; they Sentenced the Baron and Feme. But now *Ward* Serjeant moved for a Prohibition, but it was denied by the Court; for they were Plaintiffs first. And also it is a Cause, which this Court had not any Cognizance of (a).

(a) *Eton* and
Morris's Case.
Hutley Rep.

(b) Sir *Christo-*
pher Hodman
vers. *John*
Griffith. *Noy's*
Rep.

(c) *Hill*. 4 *Jac.*
B. R. inter

Turnain and
Thorne per *Cur.*
& *Mich.* 38, 39
Eliz. B. R. *But-*
ler and *Bartlett*
Adjudged.

(d) *Rep.* 14
Jac. B. Ad-
judg. vld. *Roll.*
Abr. pag 295.
nu. 2.

(e) *Mich.* 7
Jac. B. inter
Simpson and
Waters, per *Cur.*

(f) *Hill*. 7 *Jac.*
B. per *Coke*.

(g) *Hill*. 7 *Jac.*
per *Curiam* Ad-
judg.

(23.) Note, upon evidence to the Jury, Resolved by the Court that an Action upon the Case for words, lies against an Infant of Seventeen years of Age. For *malitia supplet aetatem* (b). And it is said at the Common Law, that if a Man Libel in the Ecclesiastical Court against one for saying certain words of him, which he will maintain in an Action upon the Case at Common Law, a Prohibition lies (c).

(24.) If a Man Libels in the Ecclesiastical Court against one for saying that he is a *Witch*, or the Son of a *Witch*; although no Action lies for that at the Common Law, yet no Prohibition shall be granted, for peradventure he may have some Spiritual prejudice thereby, if he should be the Son of a *Witch*, as that he cannot be a Priest or the like: (for it seems all the force of the words consists in the last words, they being spoken in the disjunctive) (d).

If a Parson of a Church call *A. B. Drunkard*, upon which *A. B.* answers *thou lye'st*; if the Parson sue *A. B.* in the Ecclesiastical Court for giving him the *lye*, a Prohibition lies, for that the Cause for which he gave him the *lye*, is not Spiritual, but depending on a Temporal thing precedent (e). But if a Man call a Minister *Knave*, he may be sued for that in the Ecclesiastical Court, and no Prohibition lies (f). If one man says of another, that he will not hear Sermons made by those who have been made Ministers by Bishops; he may be sued for that in the Ecclesiastical Court, and no Prohibition shall be granted (g).

If a Man says of another, that he keeps a *Bawdy-House*, and is sued for it in the Ecclesiastical Court, although he might have an Action at Common Law, yet the Ecclesiastical Law hath a concurrent Jurisdiction in this, and the words are mixt, for which reason no Prohibition lies (*b*). And if one says of another, that he is a *Pander*, he may be sued in the Ecclesiastical Court, for that the signification of that word is well known, and sounds to a Spiritual Defamation (*i*). Or if a Man says to another, Thou art a *Cuckoldly Knave*, and for that he and his Wife sue him in the Ecclesiastical Court for a Defamation, no Prohibition lies, for that these words amount to a Spiritual Defamation, viz. that his Wife was incontinent; in this Case a Prohibition was denied (*k*).

Husband and Wife were Divorced for Adultery, *a mensa & thoro*, & *mutua cohabitatio* (and as one of the Council said, *De omnibus Matrimonialibus obsequijs*, but the Council of the other party denied that) and after the Wife sued in the Ecclesiastical Court a Stranger for Defamation, and Sentence there given for her, and Penance enjoy'd to the party Defendant, and costs of Suit assessed for the Plaintiff; and afterwards the Defendant appeals, and after the Husband of the Wife releases all Actions, and that Suit and all appertaining thereunto, and the Defendant pleaded that Release, and they remitted back the Suit to the inferior Court again; and now *Coventry* Recorder of *London* prayed a Prohibition, for that notwithstanding the Divorce they continued Husband and Wife, and therefore the Release of the Husband should Barr the Wife from having Execution of the Sentence, and of the Costs 44 *El*. In this Court between *Steevens* Administrator of one *Steevens*, and *Totte*, the Case was, That after Divorce for Adultery of the Husband *a Mensa & Thoro*, the Woman sued in the Ecclesiastical Court for a Legacy, devised to her by the Testator, and the Defendant pleaded a Release thereof from the Husband, and thereupon a Prohibition was granted, and he shew'd that President in Court, but the President did not comprehend the Divorce; But *Doderidge* said, He well remembred when that Case was Argued, and the *parlance* then was about the Divoree. *Wentworth*, it seems that no Prohibition shall be granted, *Hill. 7 Jac.* in this Court. A Suit was commenced in the Ecclesiastical Court by two Church-wardens, and the Defendant there pleaded the Release of one of them, and thereupon a Prohibition was here granted, and after a Consultation was granted, for that they shall try that, having Cognizance of the *Principal*, and in this Case the Release is after the Appeal, and therefore it may not be pleaded upon the Appeal, for the Judges in the Appeal have no Power but to examine the former Sentence, and not any collateral matter. *Coventry*, I agree the Case of the Church-

(b) 27 H. 8. 14.
b. per Fitzherbert.

(i) Mich. 2.
Car. Inter
Lrws and
Whitley, per
Doderidge and
Jones contra
Whitlock.

(k) Hill. 9 Car.
B.R. Inter Ista
and Cobbit per
Curiam.

wardens, for that the Release of one is not any Barr in Law; for 38 Eliz. it was here resolved between *Melton* and *Winn*, that a gift of the Church-wardens without the Assent of the Sidenen or Vestry is void; but it is otherwise here, for here the Release of the Husband is sufficient to discharge the Execution of that Sentence, the which is all that we demand, 10 E. 3. such Diverce is not any Barr of Dower. The Court seemed to incline that no Prohibition should be granted, for that the Wife in such Case may be sued alone without the Husband by the Ecclesiastical Law, and this is matter merely Spiritual, viz. *Defamation*, and therefore we have nothing to do therewith, and the Release of the Husband shall not discharge the Suit of the Wife, which is only to restore her to her Credit and Reputation which was impeached by the other, and the Costs of Suit is not for any Damage, but merely for the Charge of the Suit, and therefore the Suit being not discharged, the Costs shall remain also; and this Case is not like the fore-cited Case of *Stephens*, for the thing for which that Suit was, was originally a Legacy due to Husband and Wife, and therefore there the Release of the Husband was a good discharge, but here was no duty in the Husband originally, *Ergo*, &c. *Curia advisare vult* (h).

(h) Mich. 14
Jac. B. R. Mo-
tam. verfi. Mo-
tam. Rol. Rep.
Coke 4.
Palmer and
Thorps Case.
25 El. f. 20.

In *Palmer* and *Thorps* Case it was resolved, that *Defamation* in the Ecclesiastical Court ought to have three Incidents. (1.) That the matter be merely Spiritual and determinable in the Ecclesiastical Court, as for calling one *Heretick*, *Schismatick*, *Advowterer*, *Fornicator*. (2.) It ought to concern matter merely Spiritual only; for if it concern any thing determinable at Common Law, the Ecclesiastical Judge shall not have Cognizance of it. See for this 22 E. 4. 20. the Abbot of *St. Albans* Case. (3.) Though the thing be merely Spiritual, yet he which is *defamed*, cannot sue there for amends or damages, but the Suit there ought to be for punishment of the offender, *Pro salute animæ*; For this see *Articulis cleri*, & *Circumspecte agatis*, and *Fitz.* 5 1, 52, 53. but yet the Plaintiff shall recover Costs there, and there if the Defendant to redeem his Penance agree to pay a certain sum, the Party may sue for this there, and no Prohibition lies in that Case.

In a Case of Prohibition between *M.* and *M.* in the Ecclesiastical Court; the Case was, a Suit was there for *Defamation*, by the Wife of the party, a Sentence there given, and Costs *pro expensis litis*, the Husband did release these Costs, which they would not there allow of; upon a Suggestion here that the Husband was Divorced *causa Adulterij*, a Prohibition was prayed; and for which it was urged, that the Release by the Husband was good, the Suit being there for *Defamation*, Sentence there given, the Wife Divorced *a Mensa & Thoro*, which doth not dissolve *Vinculum Matrimonij*, but that this notwithstanding

notwithstanding they may come together again when they will; and such a Divorce is no Barr of Dower. *Doderidge*. They are only to restore the Party to her good Name, in Case of Defamation: The Point here only is, the Husband and Wife are *Divorced, Causa Adulterij*, The Wife sues in the Ecclesiastical Court for Defamation, and there recovers, and Costs are given, the which the Husband did *release*; Whether this Release thus made by the Husband, shall Barr the Wife of her Costs. And if they will not allow of this Release there, whether a Prohibition shall be granted or not. The whole Court clear of Opinion, That no Prohibition in this Case is to be granted. And so by the whole Court, the Prohibition was denied.

CHAP. XXXVIII.

Of Sacrilege.

1. *Whence the word Sacrilege is derived, what it imports, and the several kinds thereof.*
2. *It is taken properly and strictly, or improperly & in sensu largo; and is of a mixt Cognizance.*
3. *The several ways whereby Sacrilege may be committed.*
4. *Who are intended by Persons Sacred, against whom Sacrilege may be committed; the division thereof.*
5. *Bartol's Definition of Sacrilege; several severe Punishments thereof Recorded by Historians.*
6. *The several Punishments inflicted on Sacrilegious Persons according to the Civil and Canon Law; The Civil Law more severe therein than the Canon; how punish'd anciently in this Realm according to the Ecclesiastical Constitutions thereof.*
7. *The dreadful Curse anciently and solemnly pronounced in Parliament against Sacrilegious Persons.*
8. *A remarkable Judgment that happened to a Bishop of Bangor for Sacrilege.*

(1.) **S**ACRILEGE, from *Sacro* & *Lego*, or a *Sacris Legendis*, that is, *suffurandis*, for that word *Lego* sometimes signifies *furari* or *rapere*: *Isidor. lib. 1. Orig. lit. f. Sacrilegus qui sacra legit, h. e. furatur.* In the Greek *ιςεργονία* importing as much as to say *ουλεγειν τα ιερα*, that is, *prædari vel violare Sacra*, for *Sacrilege* is the violation or usurpation of some thing that is Sacred, *Glos. in cap. omnes Ecclesiæ. 17. q. 4.* and may be committed three several ways: As (1.) either in respect of the *Person*, as when a Man doth wound or strike an Ecclesiastical Person in Holy Orders: Or (2.) in respect of the *Place*, as when one violates the Privileges or Immunities of the Church or Church-yard: Or (3.) in respect of the *Thing*, as when a thing Sacred or Consecrated or deputed or dedicated to some Sacred use is usurped upon and taken away, and this holds true, whether *auferatur Sacrum de Loco sacro, vel non sacro, vel non sacrum de sacro.* *Linw. de Offic. Archiep. c. 1. glos. in verb. Sacrilegium.*

(2.) *Sacrilege* is taken either *strictly* and *properly*, as when a thing sacred is stoln out of a sacred place; so it is held according to the Law generally, but either will amount to *Sacrilege* according to the Canons: or in a large sense, and *improperly*, and so it extends

tends to other Crimes, *l. si quis e. de Epif. & cla. & c. de sacrileg. per totum*. As infringing the Church's Liberties, invading Ecclesiastical goods and the like, whereof more hereafter. *Lindw. de immum. Eccl. c. 2. glos. in ver. Sacrilegi*. The Emperors held their Constitutions so sacred, that they called the violation thereof *Sacriledge*, *l. um. c. de Crimi. Sacril.* This Crime is of a *mixa* Cognizance, partly Ecclesiastical, partly Secular, whereof each Jurisdiction may *jure proprio* take Cognizance, *et cultu sit generalo. De foro compet.* So that this Crime of Sacriledge is not meerly Ecclesiastical, because the Cognizance thereof in some Cases may appertain to the Secular Judge, at least, *quoad panam*, *l. si quis in hoc e. de Epif. & Cleri*. And *Hofiensis* himself doth confels as much, *quoad panam Corporalem*; otherwise it is as to the censures of the Church *contra talia fulminandas*.

(3.) There are many ways whereby Sacriledge may be committed, as by invading the rights and goods of the Church, by unjust and illegal vexing and molesting the Church, by wasting and destroying the Church, by violating Ecclesiasticks, by a Clerks consulting with *Soothsayers*, and *Diviners*, by violating Church-Priviledges and Immunities, by striking a Clerk. *Lindw. de immum. Eccl. c. seculi glo. in verb. ausu Sacrilego*. Church-burners, Church-breakers, Church-robbers, by stealing the Church-Bible, the Chalice, or other thing out of the Church, by violating the Church-Porch or breaking the Doors thereof, by striking in the Church, or apprehending and taking any one there, by obstructing the Jurisdiction of the Church, or hindering any of that free access which he ought to have to the Church, by usurping the Guardianship or custody of a Church that is void, and under that pretence possess themselves of the Goods and Revenues thereof, by usurping and occupying the Oblations and Offerings of the Church; but to explicate the Crime of Sacriledge to its full latitude, it is requisite in order thereto, to distinguish aright of things Sacred which are violated thereby; for as *Habits* are distinguish'd *ex objectis*, so *Vices* by the matters about which they are conversant; now the matter of Sacriledge is ever something Sacred, and therefore Sacriledges are distinguish'd according to the diversity of Sacred things; whence *Aquinas* infer, that as there are Three kinds of things Sacred, *viz. Persons, Places, and some other Things*: So there is a Threefold kind of Sacriledge, *viz.* against *Persons*, against *Places*, and against other *Things* consecrated and dedicated to Divine Worship. Which distinction the *Canonists* do generally hold in each Member thereof: As Sacriledge, (1.) Against Ecclesiastical *Persons*, *cap. si quis, & c. quisque. 17. q. 4. & in c. si quis deinceps usq. ad cap. si quis suadente. ead. Can. & q.* (2.) Sacriledge against sacred places, *cap. Miror &c.*

Frater

Frater. (3.) Against the Goods and Revenues of the Church, *Cap. Sacrilgium, cap. Omnes Ecclesie, & cap. Attendendum*. It being expressly said, that *Qui pecunias vel res Ecclesie abstulerit, Sacrilgium facit in cap. qui rapit*. There is no Sacrilege but may be reduced to one of these three heads, although under them there may be divers other kinds of Sacrileges more particularly subdistinguisht.

(4.) By *Persons Sacred* is here understood such, as in a peculiar manner are set apart and dedicated to Divine publick Worship according to Sacred Ordination; and the principal kind of Sacrilege commisable against such, is the laying of violent hands on them, which is a violation of their Immunities or Privileges, *cap. si quis suadente* 17. q. 4. And as to Sacrilege committed against Places sacred, the Canon is, That *Sacrilgium Committitur auferendo Sacrum de sacro, vel non sacrum de sacro, aut sacrum de non sacro, cap. quisquis* 17. q. 4. Of which Three Members the Third doth not belong to this circumstance of Place. And as to the second Member thereof the Civil Law determines otherwise than the Canon, for in that Case the Civil Law says, That *Res Privatorum, si in eadem sacra deposita, surreptie fuerint, furti actionem non sacrilegij esse, l. Dico. ff. ad leg. Jul. pec.* yet among the Canonists it is *communis opinio*, that *furtum in loco sacrilegium est*. And where the Canon Law speaks of Churches, it says, *si qui deposita, vel alia qualibet exinde abstrahunt, velut Sacriligi Canonice Sententia subiaceant*. But every Offence done in the Church, is not Sacrilege; yet it is held, that it is in the Power of the Ecclesiastical Jurisdiction, so to prohibit the doing of some certain things and actions in the Church, that such as offend against the Prohibition, shall be reputed Sacrilegious, though the things in themselves are not Sacrilege. The Canonists also do hold, that the perverting of the Holy Scripture, to uphold, maintain, or confirm Errors, is *gravissimum Sacrilgium*. *Suarez. lib. 3. de Sacriligio c. 7. nu. 1.*

(5.) Notwithstanding what has been said, *Bartol* defines Sacrilege to be the taking away or stealing some sacred thing out of some Publick sacred place; this is most properly Sacrilege, according to *Bartol. Bart. in l. Sacriligij penam. ff. ad Leg. Jul. Peculat.* to which it may not be impertinent or superfluous to add [*cum animo furandi*]. The Civil Law punish'd it with death, *Bart. ibid. & alij. D. E. in dist. l. & Menochi de Arbit. Jud. l. 2. Cen. 4. Cas. 389. nu. 2.* So the Athenians put a Boy to death for stealing a Plate of Gold out of Diana's Temple which fell from her Crown. *Asian lib. 5. de var. Hist. cap. 16.* Among the Grecians the Sacrilegious Persons were not to have the common humanity of a Grave, but were cast out unburied. *Diod. Sicul. lib. 16. Biblic. in 6. An. Philipp.* Philip King of Macedon in his holy War against the Phoenicians, having taken their General *Onomarchus* and routed their

Army

Army, commanded the *General* to be hanged, the rest to be drowned like *Sacrilegious* persons. *Idem dist. lib. ann. 8. Philip. Alexander* the Great in the *Olympick Games* caused it to be proclaimed by an Herald, that all Exiles and banished Persons, except for *Sacrilege* and *Murder*, should be permitted to return to their own Country. *Idem. lib. 17. An. 9. Alexandri & Gemist. Pletbo. lib. 2. de Gestis. Græc. post pugnam Mantineam. Pleminius* Embassador from *Scipio* to the Senate of *Rome*, having robb'd the Treasure of *Proserpina*, and being now nigh dead by a most fearful and horrid kind of disease before he was brought to his Trial, the *Roman Senate* notwithstanding condemned him in double the sum to *Proserpina*. *Livius lib. 9. Bel. 2. Punic. & Valer. l. 1. cap. 2. Domitian*, when it was reported to him by the *Flamens* or *Jupiters* High Priests, that one had erected a Monument for his Son with Stones design'd for the Tempel or *Capital*, commanded the Monument to be pulled down, and demolished, the Bones and Ashes of the Party to be cast into the Sea, and the Stones to be restored to the Temple: *Sueton. in Domitian. cap. 8. Xenophon* relates out of the Laws of the *Athenians* against *Sacrilegious* Persons in these words, viz. Judge, O *Athenians*, in this matter according to the Law made against *Sacrilegious Persons* and *Traitors*, That if any hath committed *Treason* or *Theft* of things Sacred, let him be adjudged to death, and let Sentence be that he be not buried in *Athens*, and all his Goods confiscate. *Xenoph. de lege Atheniens.* Another Law against *Sacrilegious* persons apud *Constantinum Harmenopolum*, in hæc verba, Whoever steals any thing Sacred out of a Sacred place, let him have his Eyes pluck'd out. *Const. Harmen. lib. 6. Prompi. jur. car. 5. Guntranus* King of the *Parisians* and *Galls*, with his Nobles and Bishops assembled on the Festival of *Symphorianus*, made a Law that their Armies or Souldiers should not on pain of death, either in their March or on a Victory, rush violently into any Churches or rob the same. *Greg. Tuvon. lib. 8. Hist. Franc. c. 30. Clearchus* and *Scitacles*, Souldiers under *Alexander the Great*, being accused by his Army of robbing and spoiling Churches and removing ancient Monuments, were commanded to be put to death. *Orcines*, who succeeded *Phraortes* in the Kingdom of *Persia*, being accused and convicted of robbing and wasting the Temples, Churches, and the Monuments of the Kings, was by *Alexanders* command Crucified to death. *Arria. lib. 6. in fin. de expedit. Alexand.* The Law in some cases doth leave the Penalty of *Sacrilege* Arbitrary, especially where any Churches are notoriously and violently broken open, and the Offerings or sacred Vessels thence stolen away by night, in which case the Punishment is *Capital*; and so practised in the Kingdom of *Naples*; *Boerri Decis. 254. num. 13.* It is not the value of the thing stolen,

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that

that causes this crime of *Sacrilege* to be so severely punished, but because there is more of audacity and iniquity in this kind of Theft than of others of inferior circumstances; and therefore *Calistratus* accused *Menalopus* that he had robb'd *Templi Custodes*; *Anglice* Churchwardens, and had thence stollen away 3 very small Vessels *minimi ponderis*, yet even this was punished as *Sacrilege* of a very criminal nature. Innumerable are the Presidents of this kind found among *Historians*; to which might be added that of Famous or rather Infamous Remark, touching *Charles Martel*, King of *France*, *cujus animam* (says *Tritemius*) *visam deportari ad Inferos, quod multas Ecclesias spoliasset, dum bellis inimicos persequeretur.* *Tritem. in Breviar. Hist. Franc. in fin.*

(6.) Touching *Sacrilege* as diversified in respect of *Persons*, *Places*, and other things Sacred, the *Canonists* enumerate such kinds thereof, as would seem very uncouth and strange for us to hear of in this Kingdom, as the Constitution of Ecclesiastical State thereof is now most protestantly established; they are therefore here purposely omitted. The penalties likewise inflicted on *Sacrilegious* persons vary according to circumstances, and as the kinds or degrees of the *Sacrilege* are; and herein the *Canon* and the *Civil Law* have provided very different penalties; which at the *Canon Law* are of one kind, and at the *Civil Law* of another: But according to the ancient Ecclesiastical Constitutions of this Realm, *Sacrilege* of what kind soever, regularly incurr's the Penalty of Excommunication, which admits also of distinctions: For as there is the greater and the lesser Excommunication; so there is Excommunication *ipso facto*, in Contradiction to that which is only *ipso jure*; also the Law even in this point of *Sacrilege* doth distinguish between Excommunication *latam*, and *ferendam*; for if it be *Sacrilege* committed against an Ecclesiastical Person, then according to the *Canon Law*, and as heretofore practised in this Realm the penalty was *Excommunicatio lata*; but when it is in respect of some things pertaining to the Church, in that case the punishment was *Excommunicatio ferenda*. *Lindw. de immun. Eccl. c. 1. Glo. in ver. omnibus penis.* And sometimes a pecuniary punishment was inflicted for *Sacrilege*. *17. q. 4. c. quisquis & c. si quis consumax.* The Ecclesiastical Law doth not punish *Sacrilege* with that austerity and severity as the *Civil Law* doth, *l. Sacrilegio ff. ad Leg. Jul. pecul.* whereby the punishment sometimes is *Damnatio ad bestias*, sometimes the *Sacrilegious* person is burnt alive, sometimes hung on a Fork, sometimes condemned to the Mines, sometimes banished, and sometimes sentenced to death in the ordinary way of Execution. He that is guilty of *Sacrilege* against an Ecclesiastical person is by the *Canon Law* *Excommunicatus ipso facto*, *17. q. 4. c. si quis suadente.*

But

But if he be *in rebus Ecclesie*, he is by that Law *Excommunicandus de Foro compet. & conquestus*. If it be committed in the Church, and that by firing or breaking it open, in that Case the *Sacrilegious* person is *ipso jure* excommunicated, *de sent. Excom. c. conquesti*. If it be without burning or breaking it open, as when a thing being left in the Church, is taken away, in that case he ought to be excommunicated. *De furtib. c. fin.* And this (says *Lindwood*) may stand as a rule in Law, that wherever you find that regularly the *Sacrilegious* person is not *ipso jure* excommunicated *majori Excommunicatione*, it hath these several *Fallentias*, that is, it doth not hold in case of burning, violating, spoiling and wasting of the Church, nor in burning or breaking open the Church door, nor in *Sacriledge* against an Ecclesiastical person, nor in case of striking or violently apprehending any man in the Church, nor in any forcible or violent taking away any thing out of the Church, nor in any that were excommunicated before for the like offence, nor in such as pull down or demolish the Body of the Church or any part thereof, and the like, *Lindw. de immu. Eccl. c. ut invadentib. glo. in ver. Excommunicati*. All which is likewise expressly set down in *J. de Aibons* Glos on Cardinal *Othobon's* Constitutions, *de abstrahentib. Confug. ad Eccles. c. ad tutelam glo. in ver. Observari*. and seems to have an adequate affinity with what *Solomon* (who, as in other things, so especially in matters of the Temple, had the best experience) says, *It is a snare to the man, who devoureth that which is Holy. Pro. 20. 25.*

(7.) The dreadful Curse denounced against *Sacrilegious* Persons appears in that remarkable passage in Parliament about Four hundred years since, where the Priviledges of the Clergy, and Franchises of the Church, were (with the Liberties of the People) granted, confirmed, and settled by the King in full Parliament, *Anno 1253.* in such a solemn manner, as no History can parallel; The King stood up with his Hand upon his Breast, all the Lords Spiritual and Temporal stood with burning Tapers in their Hands, the Archbishop pronounceth as followeth, *viz. By the Authority of God Omnipotent, of the Son, and of the Holy Ghost, &c. We excommunicate, Anathematize, and sequester from our Mother the Church all those, who henceforth knowingly and maliciously deprive and spoil Churches of their right, and all those that shall by any art or wit rashly violate, diminish, or alter secretly or openly, in Deed, Word or Counsel, those Ecclesiastical Liberties, &c. Granted by our Lord the King, to the Archbishops, Bishops, Prelates, &c. For everlasting memory whereof, we have hereunto put our Seal.* After which, all throwing down their Tapers, extinguish'd and smoking, they all said, *So let all that shall go against this Curse, be extinct and stinck in Hell.* And *Ethelwolpus*, the second sole Monarch among the

vld. The Present State of Eng. p. 229.

Vld. the Char-
ter of Donati-
on in Ingulphus
and other
Authors.

Pag. 224, 225.

Saxon Kings; having by advice of his Nobles, granted-for ever to God and the Church, both the Tithe of all Goods, and the tenth part of all the Lands of *England*, free from all secular Service, Taxes, or Impositions whatsoever, concludes the said Grant or Charter of Donation in these words, *viz. Qui augere voluerit nostram Donationem, augeat Omnipotens Deus dies ejus prosperos; si quis vero mutare vel minuire presumpserit, noscat se ad Tribunal Christi rationem redditurum.*

(8.) Dr. Heylyn in his *Ecclesia Restaurata* relates a remarkable passage touching a sad Judgment, that in the time of *Queen Mary* besel *Buckly* Bishop of *Bangor*, *An. 1541.* for the *Sacrilegious* havock he made of the Lands and Patrimony of that Church, who not contented to alienate the Lands, and weaken the Estate thereof, resolved to rob it also of its *Bells* (for fear perhaps of having any knell rung out at the Churches Funeral;) and not content to sell the *Bells* which were five in number, he would needs satisfy himself with seeing them conveyed on Shipboard, and had scarce given himself that satisfaction, but was immediately struck blind, and so continued from that time to the day of his death.

CHAP. XXXIX.

Of Simony.

1. *The Definition and Description of Simony ; the Penalties thereof.*
2. *The difference between Simoniacus and Simoniace Promotus ; the latitude of that word Simony.*
3. *How the annual value of a Benefice is computable upon the forfeiture of by reason of Simony.*
4. *Whether a Clerk Simoniacally presented, but not privy to the Simony, be disabled for that turn to be presented by the King to the same Church ?*
5. *The diversifications of Simoniacal Contracts, or the various ways of committing Simony.*
6. *An Obligation to present one upon condition of resignation, may not be Simony.*
7. *To promise one a Sum of Money to bestow his endeavour to procure one to be presented to a Benefice, is a Simoniacal Contract.*
8. *Several ways of contracting, obliging, and agreeing, which will amount to Simony.*
9. *A Clerk may oblige to his Patron to pay a Sum yearly, and yet no Simony.*
10. *The Plea of Simony is a good Bar to the Parsons demand of Tithes.*
11. *Whether the Fathers free Covenant with his Son-in Law, upon the Marriage of his Daughter to present him to such a Living when it falls, be Simony ?*
12. *Whether a Simoniacal Usurper shall prejudice the rightful Patron, by giving the King the presentation ?*
13. *Whether an Incumbent that is in by Simony, may after a general Pardon be removed ?*
14. *The grand Case of Calvert and Kitchin at the Common Law touching Simony.*
15. *To convey a corrupt gift by an innocent hand, will not excuse it from being Simony.*
16. *The Kings Case against the Archbishop of Canterbury, Sir John Hall, and Richard Clark touching Simony.*
17. *The Proof of Simony in a Parson is good to bar him of Tithes.*

18. *A Patrons Presentation upon the Presentees Obligation to make a Resignation within Three Months after the Patron so please, may amount to Simony within the Statute of 21 Eliz. cap. 16.*
19. *A corrupt contract for an Advowson may make the subsequent Incumbent Simoniackal.*
20. *To plead a Simoniackal Contract against a Bond, is not so appearing, is no admissable Plea.*
21. *Masters of Chancery, why so called, and what they were anciently.*
22. *Prohibition to the High Commissioners, that would have put a Parson to his Oath touching Simony.*
23. *In what Cases (by reason of Simony) the Patron may present after six Months; and the Church said to be full as to one, not to another.*
24. *The Injunction of King Ed. 6. against Simony.*
25. *The form of the Oath of Simony.*
26. *A Simoniackal Contract a good plea in Bar of Tithes.*
27. *A further description in Law of the difference between Simoniackus, and Simoniace Promotus.*
28. *The Simoniace Promotus, though ignorant of the Simony, yet is deprivable in the Ecclesiastical Court.*
29. *A Simoniackal Contract, to which neither the Incumbent nor the Patron are privy, may yet be Simony within the Statute of 31 Eliz.*
30. *Simony in it's utmost latitude is properly cognizable in the Ecclesiastical Court.*
31. *Simony worse than Felony. A Bond or Obligation good, though entred into upon a Simoniackal Contract.*
32. *Whether a Parson ousted for Simony, may be after admitted to the same Benefice by the Kings presentation.*
33. *A Parson Simoniace Promotus, and ousted, is by the express words of the Statute disabled to accept the same Benefice.*
34. *Where Simony is pleaded in Bar of Tithes, the Ecclesiastical Court shall take Cognizance, and no Prohibition lies.*
35. *Whether the Father may buy the next avoidance, and present his Son; no Simony to buy an Advowson.*
36. *To procure a Man (in consideration of Marriage) to be presented to a Benefice, is Simony.*
37. *Four observations on the Statute of 31 Eliz. cap. 6. by the Lord Cook.*
38. *The extent of the words (Present or Collate) in the said Statute, also the diversity in Law between a Presentation made by a Rightful Patron and an Usurper.*

39. What punishment by the Canon Law in case of Simony; and the strange conceit of Rebuffus touching the same.

40. The reasons why it hath its denomination from Simon Magus; how many ways it may be committed according to the Canon Law.

(1.) **S**IMONY (from *Simon Magus*, as *Thomas Aquinas* and others conceive, *Tho. Aquin.* 20. 2. 2. q. 100. art. 1. & 40.) is according to *Panormitan*s definition thereof, *studiosa voluntas emendi vel vendendi aliquid Spirituale, vel Spiritualis annexum, opere subsecuto, Panor. c. Nemo extra, &c.* Or it may be described thus, *viz.* Simony is when any person is presented or collated to any Benefice with Cure of Souls, Dignity, Prebend, or Living Ecclesiastical, &c. or hath any such given or bestowed on him for or in any respect of any sum of Money, Reward, Payment, Gift, Profit, or Benefit directly or indirectly, or for or by reason of any Promise, Agreement, Grant, Bond, Covenant or other assurance for any sum of Money, Reward, Payment, Gift, Profit or Benefit whatsoever, directly or indirectly, or for or in respect of any such corrupt cause or consideration, and every Presentation, Collation and Gift, as also every Admission, Investiture and Induction, thereupon is by the Statute utterly void (c), and whereby the King his Heirs and Successors for that one turn only shall present, collate, &c. And every person so giving or taking any such sum of Money, &c. taking or making any such promise, &c. doth forfeit and lose the double value of one years profit of every such Benefice. Moreover, the person so corruptly taking any such Benefice is thereupon and from thenceforth adjudged a person disabled in Law to hold and enjoy the same Benefice (d). The like penalty of the said double value doth he incur, who for any sum of Money, Reward, &c. directly or indirectly (other than the lawful Fees) or for or by reason of any promise, &c. doth admit, institute, instal, induct any person to, or in any Benefice with Cure, &c. Likewise if any Incumbent of any such Benefice shall corruptly resign or exchange the same, or for or in respect thereof shall corruptly take, directly or indirectly, any Pension, Sum of Money, or Benefit whatever, in such case both the Giver and the Taker corruptly as aforesaid, shall forfeit double the value of the Sum so given, taken or had, whereof the one Moiety to the King, &c. the other to him that shall sue for the same in any Court of Record (e). In which Statute of 31 Eliz. there is a Proviso, that the censures Ecclesiastical shall not be restrained by any of the Premises therein contained.

Simonia est vox Ecclesiastica, à Simone illo Mago deducta, quod donum Spiritus Sancti pecuniis emi putavit. Injustum est illa vendere, quæ gratis distribui debent.
(c) St. 31 Eliz. c. 6.

(d) Stat. ibid.

(e) Ibid.

(2.) They that Simoniacally buy Ecclesiastical Livings are compared to *Simon Magus*, and they that sell them to *Gebazi* the Servant of *Elisha* (f). If a person be possessor of an Ecclesiastical Living

(f) 2 King. 5. 20, &c.

by

by such *Simony* as whereunto he was not privy, he is said to be in only *Simoniace*: but if he be in any corrupt and *Simoniack* Contract, to which himself is a party, and was privy and consenting thereunto, in that case he is *Simoniacus*; both which are inhibited by the Canons Ecclesiastical or Provincial Constitutions, as also are the said corrupt and *Simoniack* selling as well as buying Ecclesiastical Livings, *Linda c. Nulli liceat Ecclesiam &c. Quia plerumque*, and that under penalties greater than the Temporal Laws did then or now will allow of. And although by *Simony* in the vulgar acceptance of the word, is commonly understood such corrupt Contracts for Ecclesiastical Livings as aforesaid, yet it hath a more extensive signification and that is a more proper sense, which is by corrupt Ordinations of Ministers, as for undue Licences to Preach; for prevention whereof it is provided in the Statute aforesaid (b). That if any person shall receive or take any Mony, Fee, Reward, or any other Profit directly or indirectly, or any Promise, Agreement, Covenant, Bond, or other assurance therof (lawful Fees excepted) for or to procure the Ordaining or making of any Minister, &c. Or giving any Order and Licence to Preach, shall forfeit Forty shillings, and the Minister so made Ten pound, beside the loss of any Benefice, Living, or other Ecclesiastical Promotion after Induction, that any such Minister shall within seven years next after such corrupt entering into the Ministry, accept and take; the one half of which Forfeitures do go to the King, &c. the other to the Informer, &c. And the Patron in that case may present, &c. as if the party so inducted were naturally dead.

(b) Dict. St. 31
Eliz. Universas
promissiones
& pactiones
Simoniacas pen-
nitus revoca-
mus, & eas in
posterum fieri
strictius in-
hibemus.
— Constit.
Orthobon. cap.
quia plerumq;

(3.) The Forfeiture of the double value of one years profit of the Church by way of penalty, as is before mentioned, is not to be computed only according to the valuation in the Kings Books in the First-fruit Office, but according to the just and full annual value of the Church (i). This double value shall be accounted according to the very or true value, as the same may be let, and shall be tried by a Jury, and not according to the extent, or taxation of the Church, *Co. par. 3. Inst. cap. 71*. And albeit the Clerk be not privy to the *Simoniack* Contract, yet it seems the Patron shall *pro hac vice* lose his Presentation (k). But the Title of the rightful and uncorrupt Patron shall not be forfeited or prejudiced by the *Simoniack* Contract of an Usurper, albeit the Clerk be by his Presentation admitted, instituted and inducted, nor entitle the King to present.

(i) Co. 3. Inst.
154.

(k) Co. 12. 74.

(4.) The Church, notwithstanding the Admission, Institution and Induction, becomes void, whether the Clerk presented were a party, or privy to the corrupt and *Simoniack* Contract or not; But Sir *Simon Degge* in his *Parson's Counsellor* puts the material Question, *viz. Whether the Clerk that is presented upon a Simoniack*

cal Contract, to which he is neither party nor privy, be disabled for that turn to be presented by the King to that, viz. the same Church? In order to the resolution whereof he acquaints us with a Case reported, wherein it was adjudged, that if the Clerk were presented upon a *Simoniacal* Contract; to which he was neither party nor privy, that yet notwithstanding it was a perpetual disability upon that Clerk as to that Church or Living (l). The like in another Case, where B. (the Church being void) agreed with the Patron to give him a certain sum of Money for the Presentation; B. presented C. who knew nothing of the *Simoniacal* Contract till after his Induction; in this Case it seem'd by Warburton Justice, that C. was disabled *quoad hanc Ecclesiam* (m). In which Case it was clear, that the grant of the Presentation during the vacancy was merely void; that B. presented as an usurper; that C. was in by the corrupt Contract; and that were it not for the same, the Patron would not have suffered the Usurpation. In further confirmation hereof it is also reported to us that Sir Edward Coke affirmed it hath been adjudged, that if a Church be void, and a Stranger contracts for a sum of Money to present one who is not privy to the Agreement, that notwithstanding the Incumbent coming in by the *Simoniacal* Contract, is a person disabled to enjoy that Benefice, although he obtain a new Presentation from the King; for that the Statute as to that Living, hath disabled him during Life (n). Notwithstanding all which Premises, Sir Edward Coke in his Comment upon the said Statute of 31 Eliz. asserts it to have been adjudged in the forecited Case of Baker and Rogers, that where the Presentee is not privy nor consenting to any such corrupt Contract, there (because it is no *Simony* in him) he shall not be adjudged a disabled person within the said Act, for the words of the Statute, are (*And the person so corruptly giving, &c.*) And so (says he) it was resolved Mich. 13. Jac. Where the Presentee is not privy nor consenting to any corrupt Contract, he shall not be adjudged a disabled person within this Act, because it is no *Simony* in him — Coke Inst. par. 3. cap. 71. (o). Also it was so resolved in Doctor Hutchisons Case by the whole Court, viz. That if a Clerk be presented upon a corrupt Contract within the said Statute, although he be not privy thereunto, yet his Presentation, Admission, and Induction are all void within the Letter of that Statute, but not within the Clause of disability within the same Statute. (p).

(5.) The Contracts which are commonly held, corrupt and *Simoniacal*, may be diversified almost into as many kinds as transferences and proprietary negotiations are capable of; but those which have been most in practice (as appears by the Cases reported in the Law) have been by way of unlawful purchasing the next

(l) Pasch. 17.
Jac. B.R. Case
Fowler vers. d.
Lapthorne vid.
the Parsons &
Councillors
par. 1. cap. 5.
(m) Mich. 42.
& 43 Eliz. B.R.
Case Baker and
Rogers. Cro.
Eliz. 788.

(n) Case of the
King and the
Bishop of Nor-
wich. Cole and
Socker. Cro. Jac.
385, Bullstr. 3.
92.

(o) Co. 3 Inst.
134 cap. 71.

(p) C. 12. 101.
So was the O-
pinion of all
the Judges of
Serjeant Inn
in Fleetstreet.
Mich. 8. Jac.
Parson Counf.
ubi supra.

Advowson by Exchange, by Resignation, Bonds by Matrimonial compacts, by contracts remote and conceal'd from the Presentee, by Obligations of an indirect nature, and the like. To the purposes aforesaid it hath been held *Simony* for a Parson to promise his Patron a Lease of his Tithes at such a Rent; in case he would present another Parson into his Benefice, with whom he was to exchange, albeit that other was not privy to the Contract, he making the Lease after (q). It was likewise held *Simony* for a Father to present his Son by virtue of a purchase of the next Advowson, which he made in the presence of the Son, a Clerk, when the Incumbent was not like to live by reason of a Sickness, whereof he soon after died (r). Otherwise, in case the purchase had been made in the absence of the Son, as is hereafter mentioned (s). But per *Hutt.* it was held *Simony* to purchase the next Advowson, the Incumbent being sick (t). The like in *Winebournes* Case against the Bishop of *Winchester* and *Puleston*, a Case hereafter often margined on several accounts, where it was held *Simony* in one *Say*, who was presented upon a Contract which he made with the Patron (the Incumbent being then sick) for ninety Pound to present him when the Church should be void (u). And as to Resignation-Bonds, Sir *Simon Denge* affirms, that in the case of *Jones* and *Lawrence* the sense of the Court was, that if a Man be preparing his Son for the Clergy, and have a Living in his disposal, which falls void before his Son is capable thereof, he may lawfully take a Bond of such person as he shall present, to resign when his Son becomes capable of the Living; otherwise, in case the Patron take a Bond absolutely to resign upon request without any such or the like cause, as for avoidance of Pluralities, Non-residence, or other such reasonable design (w). The like you have in *Babbington* and *Wood's* Case hereafter mentioned. So that it seems Bonds and Obligations given and taken upon just and honest grounds to resign are not in themselves *Simoniackal*; Otherwise, where there is corruption in the case, accompanied with some subsequent Act in pursuance thereof. And although presentations made upon *Simoniackal* Bonds and Obligations are void in Law, yet such Bonds themselves, though corrupt and *Simoniackal*, are not made void by the Statute of 31 *Elizabeth* (x).

(q) *Hill. 16. Jac. Rot. 667. c. B. per Grant and Browdens Case.*
 (r) *Case Smith* vers. *Shelburne.* *Dare 976. Cro. Eliz. 685.*
 (s) *Ibid. & infra* cod. *Noy. Rep.*
 (t) *Case Sheldon* vers. *Brett.* *Winch. 63.*
 (u) *Hob. 165. vid. Parson's Councillor.* *part. 1. c. 5.*
 (w) *8 Jac. Case. Jones and Lawrence. Cro. 248, 224. Parf. Councillor. Ibid.*
 (x) *Co. 3. Inst. 193. Noy. 72.*

(6.) *B. brought Action against C. upon an Obligation, the Condition whereof was, That whereas the Plaintiff did intend, and was about to present the Defendant to the Benefice of Stow, if the Defendant at the request of the Plaintiff should resign the same to the hands of the Bishop of London, then the Obligation to be void. The Defendant demanded Oyer, and demurr'd, and adjudg'd for the Plaintiff, for the Resignation might be upon a good intention to prevent Plu-*

Pluralities, or some other cause, and it shall not be intended *Simony*, if it be not specially pleaded and averr'd; and *Mich. 37* and *38 El.* Between *Jones* and *Lawrence* it was adjudg'd accordingly, and affirmed an Error, which the Court viewed, and thereupon Judgment was given for the Plaintiff (a).

(7.) The Plaintiff declared, that the Rectory of *St. Peters infra Turrim London* was void, and that the Defendant in consideration that the Plaintiff would bestow his labour and endeavour to cause or procure him to be Rector of the said Rectory, promised to give him twenty Pounds; and that after the said Plaintiff procured him to be Rector by the Kings Commission, and notwithstanding that he had required him to pay the said twenty Pounds, &c. and thereupon he brought his Action upon the Case in the Court of the Tower of London, and upon *Non Assumpsit*, it was found for the Plaintiff, and Judgment was there given, upon which the Defendant brought Error, and *una voce* all agreed that the Judgment was erroneous, for the consideration was *Simoniacal* and against Law, and not a good consideration, therefore the *Assumpsit* was not good, the Judgment was revers'd; the Attorney said, that that Court was a Court-Baron; as appears by a Record in the time of King Henry the Sixth (b).

(8.) If A. be obliged to present B. &c. and he presents by *Simony*, yet the Obligation is forfeited (c). Or if one Contract with the Patrons Wife to be presented for Mony, and is accordingly presented by her Husband, it is *Simony* within the Statute of *31 Eliz.* and makes the presentation void (d). For the Contract of the Wife is the Contract of the Husband (e). Likewise if the Patron present one to the Advowson, having taken an Obligation of the Presentee, that he shall resign when the Obligee will, after three Months warning, this is *Simony* within the Stat. of *21 Eliz. cap. 16. per Curiam* (f). Also if one promise to a Man that hath a Mannor with an Advowson appendant, that if he will present him, &c. after the then Incumbents death, he will give him such a certain Sum of Mony, and the other agree thereto, and that by agreement between them the next avoidance shall be granted to B. &c. who after the then Incumbents death presents accordingly; this is *Simony* because there was a corrupt Contract for the Advowson (g). For although the next avoidance may be bought and sold *bona fide* without *Simony*, yet if it be granted to one to perform a corrupt Contract for the same, it is otherwise (b). But if the Father purchase the next avoidance, and after the Incumbents death present his Son, this is not *Simony* (i). Yet by *Hob. Chief Justice* it was held, that if in the grant of the next avoidance it appears that it was to the intent to present his Son or his Kin-

(a) *Hill. 4. Car. B. R. Case Babington* vers. *Caleb Wood*. *Jones Rep.*

(b) *Pasch. 10. Car. B. R. Tad-deridge* vers. *Mackalley*. *Jones Rep.*

(c) *Per Hob. Case Wincomb* vers. *Pulleston*, *Noy Rep.*
(d) *Mich. 13. Jac. B. R. Case of the K. vers. Bishop of Norwich*. *Roll. Rep.*
(e) *27 H. 8. 26.*

(f) *Trin. 15. Jac. C. B. Rot. 1051. Sir Jo. Paschal* vers. *Clark*. *Noy Rep.*

(g) *Case Wincomb* vers. *Pulleston*, *Noy Rep.*
(h) *Ibid.*
(i) *Adjdg. 42 & 41. Eliz. Smith and Shelborne's Case*. *Noy Rep.*

(k) Noy ibid. man, and it was done accordingly, it is *Simony* (k). Likewise if a Mans Friend promises the Grantee of the next avoidance a certain sum of Mony, and so much certain *per annum*, if he will present B. to the Church *Quando*, &c. and B. not knowing any thing of the Contract, be presented accordingly, this is *Simony* (l). For if a Stranger contract with the Patron *Simoniacally*, it makes the Presentation void (m).

(l) 7 Jac. Calvert vers. Parkinson in Cam. Scaear. Noy Rep.

(m) M. 12. Jac. B.R. Case of the K. vers. Bishop of Norwich Roll.

(n) Adjudg. in Bakers Case vers. Mounford

(o) E. of Essex Case vouch'd by Foster Justice in dict. Bakers Case. Noy Rep.

(p) 10 Eliz Doct or Hutchinsons Case cited by Warburton and Hutton. Noy Rep.

(q) Dict. Cas. winchcomb vers. Pullaston.

(r) Ibid.

(s) Noy winchcomb Case.

(t) Dict. Cas. of the King vers. the Bishop of Norwich. Roll. Rep.

(u) Cro. Car. 425.

(w) Hob. 167.

(x) Pasch 17. Jac. case of Sir Jo. Bows vers. Wright, 167, 168, 177.

(9). A Patron took an Obligation of the Clerk whom he presented, that he should pay ten Pounds yearly to the Son of the last Incumbent, so long as he should be a Student in Cambridge unpreferr'd; this is not *Simony*; otherwise, if it had been to have paid it to the Patrons Son *per Cur.* (n). An Obligation was made by a Prefectee to a Patron to pay five Pounds *per annum* to the late Incumbents Wife and Children; the Parson kept and enjoyed the Parsonage, notwithstanding great opposition to the contrary (o).

(10.) A Parson prefer'd his Bill for Tithes, the Parishioner pleaded that he was presented by corruption, &c. and by *Simony*, and a Prohibition was granted, notwithstanding the Parson pleaded pardon of the *Simony* by the King; and it seem'd, that it was now triable by the Common Law (p). The Church may be full or void in effect, when there is a *Simoniackal* Incumbent; yet to say the Church, was full for six Months is no plea, when he was in by *Simony*; For a *Quare Impedit* may be had by the rightful Patron after the six Months against the Incumbent of an usurper, that is in by *Simony* (q). And the death of a *Simoniackal* Incumbent doth not hinder but that the King may present, for the Church was never full as to the King, and that Turn is presented to the King by force of the Statute (r).

(11.) In the Statute of 31 Eliz there is no word of *Simony*, for by that means then the Common Law would have been Judge, what should have been *Simony* and what not (s); by which Law the *Simoniack* is perpetually disabled (r). And a Covenant to present such a one, made under any consideration whatever, be it of Marriage or the like, may be *Simoniackal*; but if a Father in Law upon the Marriage of his Daughter, do only voluntarily and without any consideration, Covenant with the Son in Law, that when such a Church, which is in his Gift, falls void, he will present him to it. It hath been held, that this is no *Simony* within the said Statute (u).

(12.) A *Simoniackal* Usurper presenting, shall not prejudice the rightful Patron, by giving the King the Presentation (w). The proof of *Simony* will avoid an Action of Tithes commenced by a *Simoniack* Parson (x); who dying in possession of the Church; the

the King loses not his Presentation (y), because the Church was not full of an Incumbent; but remains void though the *Simony* or Penalty thereof were pardoned. *Lastly*, All corrupt resignations and exchanges of Ecclesiastical Livings, are punishable with the forfeiture of double the Sum given and received, both in Giver and Taker, by the said Statute; but it seems this works no avoidance or disability in the publick person.

(13.) The Patron of an Advowson before the Statute of 31 *Eliz.* for *Simony* doth sell *proximam Advocationem* for the sum of Mony to one *Smith*, and he sells to this *Smith* the Incumbent: After which comes the general Pardon of the *Queen*, whereby the punishment of *Smith* the Incumbent is pardoned, and of *Smith* the Patron also. If the Incumbent may be removed was the Question: *Williams* said that the Doctors of the Civil Law informed him, That the Law Spiritual was, for that *Simony* the Patron lost his Presentation, and the Ordinary shall present, and if he present not within six Months, then the Metropolitan, and then the King. *Spurling* Serjeant; This punishment cannot discharge the Forfeiture, although it dischargeth the punishment. *Glanvil contra*; and said that this point was in question when the Lord Keeper was Attorney, and then both of them consulted thereupon, and they made this diversity, *viz.* Between a thing void and voidable, and for *Simony* the Church is not void until Sentence Declaratory, and therefore they held that by the Pardon before the Sentence all is pardoned, as where a Man commits Felony, and before Conviction the King pardons him, by this Pardon the Lord shall lose his Escheat, for the Lord can have no Escheat before there be an Attainder, but that is prevented before by the Pardon: And so here this Pardon prevents the Sentence Declaratory, and so no title can accrue to the Ordinary. *Walmsley contra*: If a Patron be charged by the Sentence, he may plead the Pardon. But if a *Quare Impedit* be brought by a third Person, the Pardon of the King shall be no Bar to him, for the title appears not to him, but only the punishment. *Anderfon*, they may proceed to Sentence Declaratory, notwithstanding the Pardon; for the Pardon is of the punishment, but the Sentence extends not to that, but only to declare that the Church is void. *Glanvil*, in 16 *Eliz.* a Man was deprived of his Benefice for Incontinency, and after he was pardoned and restored. *Walmsley*, I doubt much whether the King can Pardon *Simony*. And *Williams* said, that the Doctors of the Civil Law said, that neither the Pope nor the King could pardon *Simony quoad culpam*, but only *quoad penam* they may: And the Court at last said, that if the parties would not demur, they would hear the Doctors on this matter (2).

(2) Hill. 41.
Eliz. C.B.
Smiths Case.
Owens Rep.

(14.) In

(14.) In *Calverts Case* against *Kitchin* and *Parkinson* in the Exchequer, where *K.* not knowing of any *Simoniackal* agreement, was presented, instituted, and inducted to the Church of *D.* and this after the Statute of 31 *Eliz. cap. 6.* And this Presentation belonging to the Queen by reason of the Presentation for *Simony* by force of the said Statute; the Queen presented one *B.* and before that *B.* was admitted and inducted, the Queen died; whereupon the King presented *C.* without any recital or mention of the Presentation made by the Queen, and without any revocation actually made of the said first Presentation, and thereupon *C.* is admitted and instituted; and for Tithes as Parson he brought Trespass. In this Case one of the points in Question was, if within the said Statute here be *Simony* in the Patron, and not in the Parson, if this ought to prejudice the Parson or not? In this point *Hitchcock* conceived that although the Presentee in this Case, was not party to this corrupt agreement, yet he shall be prejudiced by it, although not so prejudiced thereby, but that he may be capable to be presented again to the same Benefice, but *hac vice* the Presentation of him is void; for as *Linsleton* saith, the Presentee ought to accept the Parsonage subject to such charges as the Patron pleaseth, who in the time of vacation hath power to charge it, and so by his Act had made it subject to the forfeiture, and therefore the person who cometh under him shall be prejudiced, &c. *Dampport* to the contrary; the Patron and a Stranger corruptly agree to present *K.* whereupon he is presented; If this shall be void against *K.* is the Question. To this he said that at the Common Law, if one be *Simoniackally* presented, yet this is not void until the Presentee be deprived; and if before the said Statute such a corrupt Presentation had been made, the Incumbent and Ordinary being free, then no Presentation should ensue; and he *vouched* the saying of *Lindwood* to be accordingly; but if Money be given by the Friends of the Presentee, and after the King had notice thereof, and assent, then it is not punishable, but pardonable at the discretion of the King, and now by him the Statute provides no punishment for the Parson, when the Patron only consents to the *Simony*; for he observed that after the said Statute of 31 *Eliz.* had appointed a punishment for the Patron then in the last part of this Branch, the words are, *The persons so corruptly taking, &c.* shall be incapable of the Benefice aforesaid; and so it seemeth, that the intent of the Statute is not to punish any party, but he that is to the *Simony*, and this is also explained to be so, but other Clauses in the Statute, for another Clause inflicts punishment upon the Ordinary, if there be any corruption in him, and another Clause inflicts punishment upon him who is party to a corrupt Resignation, and so in all the Clauses, those only who are par-

partakers of the crime shall be punished, &c. And in this Case was no agreement assented unto by the Parson; and this diversity also seems to be good, that if *A.* hath the Presentation, and *B.* the Nomination to a Benefice, and the Presenter upon a corrupt agreement makes a Presentation unknown to the Nominator; here the Nominator shall not be prejudiced within this Statute, &c. In this case *B.* Baron declared his opinion, that the intent of the Statute was to eradicate all manner of *Simonies*; and therefore the words are not if any Man give Money to be presented, but they are, *If any present for Money*, and the Jurors here found 20 *l.* to be given, and nothing for what it was given, or to whom it was given; for if Money be the meed, a Presentation is void, and therefore if *J.S.* be Patron of the C. of *D.* which is void, and a Stranger saith to me, procure the Presentation for *A.* and you shall have 100 *l.* and he procured *A.* to be presented, here if the Patron had notice of the Money given to me, this Presentation is void, but otherwise not: And in this Case without notice of the Parson, the Admission and all that ensued thereupon is void, by reason of the *Simony* in the Patron, and it is void as to the Parson also, and if in this case we are not within the words of the Statute, yet we are within the intent clearly, &c. And *Panormitan* saith, that *Simonia est studiosa voluntas emendi vel vendendi aliquid spirituale, vel spirituales annexum cum opere subsequente.* *Alsbam* Baron was of the same opinion, and said that the words of the Statute are, that if a Presentation be made for Money, it should be void, and that the King may present that turn; and therefore the want of privity in the Incumbent is nothing to the purpose, as to the avoiding of the Benefice; but his want of privity availeth to excuse him of being *Simoniacus*, yet he is *Simoniace promissus*, and therefore the Presentation is void, and the King shall have it by the express words of the Statute; and therefore as it seems, if in this Statute there had been an express saving of the Interest of the Incumbent, by reason of his innocency, yet such a saving of Interest had been void and repugnant, in respect that it was expressly given to the King before, as it is in *Nichols* case in *Plowden* upon the Stat. of 1 H. 7. &c. And to prove that by the *Simony* in the Patron the Parson shall be prejudiced, he vouched 42 E. 3 fol. 2. — *Snig* Baron concurr'd in opinion with the former, and said that as to the point of *Simony* by the Civil Law, it was punishable by Deprivation, and the guilt of the Patron should prejudice the Parson, as to matter of commodity in the Parsonage; and at the Common Law if the Parson will plead such Presentation he should be prejudiced, and here by the Incumbency the words of the Statute will not be satisfied, &c. Also it seemeth that if *J.S.* hath an Advowson, and *A.* purchase the next avoidance to the intent to present *B.* and the Church becomes void, and *A.* pre-
sents

sents *B.* this is *Simony* by averment, as by good pleading the Presentation of *B.* shall be adjudged void, &c. *Tanfield* accordingly, as this Case is, here is *Simony* by the Civil Law, and the party had his Benefice by *Simony*, although he be not cognizant thereof. Secondly, admit here was not *Simony* by the intendment of the Civil Law, yet the Statute hath made an avoidance of the Benefice in this Case, although it be not *Simony*, for the Statute speaks not one word of *Simony* throughout the Act, and yet by express words it doth avoid such Presentations as this is; and as to the Civil Law such Benefice is to be made void by Sentence Declaratory, but it is not void *ipso facto*, as it seems in the Case where a common person was consenting to the *Simony*; but the Text of the Civil Law says expressly, that the Church ought not to be filled *Corruptive*, or by corruption, and the Civil Law expresseth such a person as in this Case by *Simoniace promotus*, and calls him who is *Particeps Criminis*, *Simoniacus*; and he who is *Simoniacus*, is by the Civil Law deprived not only of the Benefice *ipso facto*, but also is deprived to be a Minister, and adjudged guilty, *in culpa & pana. Petrus Benefieldus* saith, That if a Friend give Money to a Patron, to make a promise to him, &c. and the Incumbent pays it, such an Incumbent is *Simoniacus* by the Civil Law; and so if the Incumbent pay the Money not knowing it till after the Induction, yet he is *Simoniacus*; and by him if a Friend give Money, and the Parson is thereupon presented, though the Parson knew not of the Money given, yet he shall be deprived of the Benefice; and this difference was certified by *Anderson and Garady* to the Council-Table upon a Reference made to them by the King, touching the filling of Benefices by corrupt means; and this Statute of purpose forbears to use the word *Simony*, for avoiding of nice construction in the Civil Law as to that word, and therefore the makers of the Act set down plainly the words of the Statute, That if any shall be promoted for Money, &c. So that by these words it is not material from whom the Money comes; and then in such cases for the avoiding of all such grand Offences a liberal construction ought to be made, as hath been used in such cases, &c. for which and many other reasons mentioned in this Report, he commanded judgment to be entred for the Plaintiff

(a) Trin. 7. Jac.
in the Exchequer,
Calvert against Kitchen
and Parkenson,
and Kitchen against
Calvert.
Laws Rep.

(15.) Sir George Cary, being seised of an Advowson, granted the next avoidance to his second Son, and died; and after the Son corruptly agreed with J.S. to procure the said J.S. to be presented to the Benefice, and the second Brother knowing thereof, it was agreed that for the perfecting of the agreement, the second Brother should surrender his Grant and Interest to the elder Brother, which elder Brother not knowing of the said corrupt agreement,

ment, Presented the said J. S. who was Instituted, &c. all shall be void, for he is here Presented by reason of this corrupt agreement between the Patron who then was, and the Parson, and the elder Brother was only used to convey a bad gift by a good hand, and all had reference to the corrupt Agreement, with the Assent of the Patron who then was (b).

(16.) The King brought a *Quare Impedit* against the Archbishop of Canterbury, Sir John Hall, and Richard Clark, for the Church of M. and declares that Richard White was seised of the Mannor, to which the Advowson belonged. And the 6 Jac. by Indenture, he covenanted to stand seised to the use of himself and his Wife for their lives, and to the heirs of Richard White. And after White Presents one Boynton, and dies, and his Wife Marries with Sir John Hall, who the first of June, 6 Jac. by Deed grants *proximam Advocationem* to two, to this intent, that he might receive of such a Parson, that he Presented, all money as should be agreed between Grantor and Grantee: And that this was done Boynton lying in extremis. And then the 26. Jan. 16 Jac. there was a corrupt Agreement between Sir John Hall and one of the Grantees, that for 200 l. to be paid by the Clerk Blundel, that the other Grantee should Present him. And the first of February Blundell pays Sir John Hall the money, and the second day he was Presented, Instituted, and Inducted accordingly. And that upon this it appertained to the King to Present: The Bishop pleads but as Ordinary: Sir John Hall makes a title, and traverses the corrupt Agreement: The Incumbent Pleads by Protestation that there was not any corrupt Agreement, as it was alledged, and not answers whether the money were paid or not; but that he is Parson *Impersonae* of the Presentment of—But 16 Jac. after such an Agreement (*scil.*)

17. Feb. he was Presented by the Letters Patents of the King to his Church, and never answers to the Simony. And it was held by the Court to be naught; and only pleaded to hinder the Execution before the Justices of Assize, if the trial went against the Patron (c). And further in that Case between Hall and Blundel, it was said by Davenport, that this Parson being Presented by Simony, is disabled to this Church for ever; and cannot be Presented to this Church again, as it was adjudged in my Lord Windsors Case. But it was said by Richardson if he had said, *abq; hoc*, That he was in *ex Presentatione* of, &c. it had been good enough, which was granted. Henden, two Exceptions had been taken. (1.) That the Incumbent doth not shew what Estate or Interest the King had to Present him; which doth not need, if the King brought a *Quare Impedit*; then it is a good answer to say, that he is in of his Presenting. But if it be brought by a stranger, then he ought to shew the title in his

(b) Glose and Pompeys Case vouched by Dampart in Caluarts Case against Kitchin. Lamm Rep.

Trin. 4 Car. C. B.

(c) The King against the Archbishop of Canterbury. Hethly's Rep.

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Presentment. And he alledged the Statute of 25 E. 3. which enables the Incumbent to plead by Writ of the Law. 41 Eliz. There was a *Quare Impedit* brought for the Church of *Danell*; a Presentation by the King was pleaded, without making a title, and it was admitted good. And in many Cases it is more safe not to make a title. (2.) Because that he pleaded a Presentation by the King, he is disabled. As to that he said, that before he be convicted of Simony, he may be Presented. But by *Crook* in *Sathers* Case, that if he be Presented before conviction, yet it is a void Presentation. And it was so agreed by the Court, and they resolved the Plea was nought, because he answers nothing to the Simony; for the Protestation is not any answer: wherefore Judgment was given for the Plaintiff (d).

(d) *Hall and
Blundels* Case.
Hetty's Rep.

(17. F. Libels in the Ecclesiastical Court for Tithes, and a Prohibition was prayed upon a Suggestion that he came to the Church by Simony. By the Court, a Prohibition ought to be granted upon a surmise only, that he came to the Church by Simony. Then *Henden* shewed, that it was found by Verdict in the Kings Bench, that he came in by Simony; and upon that Verdict there was a Decree in the Court of Wards accordingly. And then the Court inclined to grant a Prohibition. And the Case here was, that F. being convicted of Simony, the King Presents *Clapthorn*, who was Admitted, Instituted, and Inducted: And afterwards he takes another Benefice above the value of 8 l. by which the other was void. Yet by the Assent of the Lord *Windsor* Patron, F. continued in Possession. And by *Richardson*, he cannot be any way removed until Lapse incur (e).

(e) *Fowlers*
Case. *ibid.*

(18.) It was said by the Court in *Sir John Pasche's* Case against *Clark* upon Evidence, that if the Patron Present one to the Advowson, having taken an Obligation of the Presentee, that he shall resign when the Obligee will, after three Months warning, that that is Simony within the Statute of 21 Eliz. cap. 16.

(f) *Trin. 15
Jac. C. B. Rot.
2051. Sir John
Pasche's* ver.
Clark. Noy's
Rep.

(19.) A. Seised of a Mannor with an Advowson Appendant: S. comes to A. and promises that if he would Present him, &c. after the death of the now Incumbent, he would give him Seventy pounds, to which he agreed. And upon that it was agreed between them, that the next Avoidance shall be granted to B. &c. the Incumbent dies, B. Presents S. who continues Incumbent from 27 Eliz. until the 7th of King James, Then A. grants the Mannor cum pertinent. to *Winchcombe* in Fee, S. the Incumbent dies, 7. Jac. And the King Presents *Pulleston* by the Title of Simony: And *Winchcombe* brought a *Quare Impedit*, and adjudged that it doth not lie. In which Case two points were resolved: (1.) That that

that is Simony; Note, that in the Stat. of 31 *Eliz.* there is no word of Simony; for by that means then the Common Law would have been Judge, what should have been Simony and what not. *Secondly*, although that the *procchein Avoidance* might be bought and sold *bona fide*, without Simony, yet it was so granted to *B.* to perform the corrupt Contract, 2 *Fac.* was *vouch'd*, that if the Father purchas'd the *procchein Avoidance*, and Presents his Son after the death of the Incumbent, that is not Simony, and that it was accordingly judged in 42 and 43 *Eliz.* It was *Smith* and *Shelborns* Case. But by *Hubbard*, that if in the grant of the *procchein Avoidance* it appears that it was to the intent to Present his Son or his Kinsman, and it was done accordingly, that is Simony: In the 7th *Fac.* In the Exchequer *Calvert* against *Parkinson*. The Cousin of *C.* being Clerk comes to the Grantee of the *procchein Avoidance*, and promises him Twenty pounds, and Twenty pounds *per an.* if he will present *C.* to the Church *quando*, &c. *C.* not knowing any thing of the Contract, is Presented accordingly. This is Simony, *a Fortiori* in this Case where *S.* himself who was to be Presented, was party to the first motion of the Contract for Presentation: (2.) It was Resolved, That the death of the *Simoniackal* Incumbent doth not hinder but that the King may well present, for the Church was never full as to the King, and that Turn is preserved to the King by force of the Statute, yet it seems the Church is so full that a Stranger may not Present for usurpation; for it is not like 7 *Rep.* 28. where the King is to Present by Lapse. And there are many Cases wherein the Church may be full or void in effect, when there is a *Simoniackal* Incumbent. *Hubbard* said, That if *A.* be obliged to Present *B.* &c. and he Presents by Simony, yet the Obligation is forfeited, &c. The rightful Patron may have a *Quare Impedit* after the Six months against the Incumbent of an usurper, that is in by Simony. And by the Court, to say the Church was full for Six months, is no Plea, when he is in by Simony. *Warburton* and *Hutton* cited Doctor *Hutchinsons* Case 10 *Eliz.* A Parson prefers his Bill for Tithes, the Parishioner pleads that he was Presented by corruption, &c. and by Simony, and a Prohibition was granted, notwithstanding that the Parson pleaded Pardon of the Simony by the King, and it seem'd that it was now triable by the Common Law. Note 7 *H.* 37. and *Mich.* 40 & 41 *Eliz.* *Gregory* against *Ouldbam*. In debt upon an Obligation to perform certain Covenants, which in truth were *Simoniackal* Contracts, and the Plaintiffs recovered, for it was said that that Obligation is collateral, and the Law does not at all look upon or take notice of the Simony, *eo nomine*, for it is not once named in the Statute, but only *corrupt giving*, &c. (g).

(g) *Wincombe*
against *Palliston*.
Noy's Rep. vid.
dist. Case.

(20.) In debt upon an Obligation, it was said that it was made upon a *Simoniack* Contract for Presentation to the Church, with the cure of Souls; and so it was for Simony. All that was averr'd the Court held to be matter *dehors*, and not appear'd within the Deed; and for that the Plaintiff had Judgment. For no such averment is given by the Statute (*b*). Note, the Statute doth not make the Bond, Promise, or Covenant void, but the Presentation. And so adjudged, *Pasch. 40 Eliz. Rot. 1745. C. B. Case of Gregory against Oldbury. Co. Inst. par. 3. cap. 71.*

(b) *Gregory*
vers. *Olden.*
Noy's Rep.

(21.) If an innocent Incumbent be in by a *Simoniack* Contract, to which he was no way privy, he is not *Simoniacus* though *Simoniace promotus*; and as he is not *Simoniacus*, so neither *Perjurus*, for Simony seldom goes without some kind of *Perjury*. An Action was brought upon 5 *Eliz.* for *Perjury* before one of the Masters of *Chancery*, who had power to take an Oath. Adjudged *quod nihil cap. per breve*. And the reason was, because he does not shew what the Oath was in Court. By *Whitlock* they were called Masters of *Chancery*, because they were Priests and Clergy-men in ancient time: and that was the reason that the Lord Chancellor had the disposal of the petty Offices of the King, for the Preferment of these Clerks: that was also the reason that they could not Marry until they were enabled by the Stat. &c. (*i*).

Masters of
Chancery, why
so called.

(i) *Lutter* vers.
Holland. Noy's
Rep.

(22.) Parson *L.* was convented before the High Commissioners, and they would put him to his Oath touching Simony (supposing it to be committed by him.) And a Prohibition was granted, that none shall be compelled to accuse himself upon his Oath; where he is to incur a temporal punishment at the Common Law, or a temporal loss, as in that Case of his Church: So for *Usury*. Note, *Dyar. 175. in the Margin.* And Cook Chief Justice, *vouch'd 10 Eliz. Smith's Case*, an Attorney of that Court. The High Commissioners would put him to his Oath, for hearing Mass. And a Prohibition was granted, for by that he is to lose One hundred pounds by the Statute, and a Prohibition was now granted by the Court (*k*).

(k) Parson
Lutter's Case
against *Suffex.*
Noy's Rep.

(l) *Co. Lit.*
120.

(m) *Winch-*
combs Case.
Hob. Rep. 227.

(23.) If a Stranger, having no Title, present *per tors*, to a Church (being void) *Simoniackly*, and Six months pass, yet the true Patron may after Present; for the Statute hath made such Presentation, Institution, and Induction void, and so he is no Incumbent, nor is the Church full (*l*). Likewise, if a Man be Presented, Instituted, and Inducted by Simony to a Church, although it be void as to the King, and as to the Parishioners, yet it is not void as to an usurper, for he that hath no right shall not Present thereunto (*m*).

(24.) To

(24.) To avoid the detestable Sin of Simony, because buying and selling of Benefices is execrable before God; it is therefore ordained by the Injunctions of King Ed. 6. *An. 1547.* That all such persons as buy any Benefices or come to them by fraud or deceit, shall be deprived of such Benefices, and be made unable at any time after to receive any other Spiritual Promotion. And such as do sell them, or by any colour do bestow them for their own gain or profit, shall lose the right and title of Patronage, and Presentment for that time, and the gift thereof for that vacation shall appertain to the Kings Majesty (n).

(25.) The Oath of *Simony* is as followeth, viz. I A. B. do swear that I have made no Simoniackal Payment, Contract, or Promise, directly or indirectly by my self, or by any other to my knowledge, or with my consent, to any person or persons whatsoever for or concerning the procuring or obtaining of the Rectory or Vicarage of A. in the Diocese of London. Nor will at any time hereafter perform or satisfy any such kind of Payment, Contract, or Promise made by any other without my knowledge or consent. So help me God, &c.

(*) Vid. Bishop Sparrow's Collection of Artic. &c. The Oath of Simony.

(26.) P. Parson of R. in the County of W. sued for Tithes in the Ecclesiastical Court before the Ordinary, and the Defendant here pleads that the same Parson was Presented upon a *Simoniackal Contract*, and for that his Presentation, Admission, and Institution was void, by the Stat. of 31 Eliz. the Simony was for that it was agreed between the said Parson and another that was Brother to the Bishop of L. and C. who was Patron of the same Church; that if he should procure three several Grants of three several next Avoidances, to them severally granted, to surrender their said several Grants, and procure the said Bishop to Present him when the Church became void (it being then full of an old Parson being mortally sick) that he would make to him a Lease of parcel of the Tithes of his Rectory: and the Brother of the said Bishop procured the said Grantees to surrender their several Grants accordingly (the Church being then full.) And also after when the Church became void, he procured the said Bishop to Present him according to the first Contract, and then the said P. made a Lease to him of the Tenth, and after sued others of his Neighbours in the Ecclesiastical Court for Tithes, who pleaded the said *Simoniackal Contract*; and here *Nichols* Sergeant suggested, that the Judges Ecclesiastical would not allow of this Plea there; but the Court would not give credit to this suggestion; but said, that if the Ecclesiastical Court make exposition of the Stat. of 31 H. 8. against the intent of it, that then they would grant a Prohibition, or if they should deny to allow of this Plea; and for that advised him, that his Client might offer this Plea another time to them, and if they denied to grant that, they would grant a Prohibition.

Penns Case.
Brownl. Rep.
par. 2.

(27.)

- (27.) The Patron of a Benefice may be sued in the Ecclesiastical Court for Presenting his Clerk (who is also inducted) by Simony, for the Statute of Simony takes not off the Ecclesiastical Jurisdiction from punishing the party *pro salute animæ* (o). And where the Parson is party or privy to the Simony, he shall be perpetually disabled. Also if money or other reward be given for the Presentation, be it with or without the agreement or knowledge of the Incumbent, yet it shall always disable him from enjoying that Church (p). In *Wilsons Case* against *Bradshaw* it was said by *Doderidge* Justice, that Simony is a Contract either with the Patron to Present, or with the Ordinary to Institute, and if it be not one of these it is not Simony by the Common Law; *Simoniacus* is he which makes such a contract or promise, and he is disabled to take any other Benefice, and shall be deprived of the Church in which he is: But *Simoniace promotus*, is he whose Friend (without his privy or knowledge) gives money to the Patron or Ordinary for his Presentation or Institution, and he shall be deprived of the Benefice to which he is corruptly promoted, but not incapable of any other, nor of that, if he shall have it duly again; and every corrupt Contract for a right to Present, is Simony (q).
- (28.) In a Prohibition, the Case was, *A.* seized of the Advowson of the Church of *B.* the Church being void: *C.* before the General Pardon 39 *Eliz.* contracted with him for the Avoidance, who for 100 *l.* granted it to him; and he by colour of this Grant Presented his Brother to the Avoidance: This was held to be Simony in the Grantee the Incumbent, although he was not privy to the Simony at the first; and Simony was there defined to be *Voluntas sive desiderium emendi vel vendendi spiritualia vel spiritualibus adhaerentia vel annexa* (r). Or thus, *viz.* The Church being void, *B.* contracted with the Patron for 180 *l.* to have the Presentation, and thereupon Presented *W.* his Brother, who knew nothing of the *Simoniacal* contract, till after his Induction, notwithstanding he was deprived in the Ecclesiastical Court, because he was *Simoniace promotus*; and it was held in this Case, that if an usurper Present by Simony, the Clerk is punishable in the Ecclesiastical Court for the Simony, although the Patron doth recover the Advowson and the Presentation.
- (29.) In the Case between the King and the Bishop of *Norwich*, and *Saker*, and *Cole*, It was said by *Coke* Chief Justice, that if a Church be void, and a stranger without the privy of the After Incumbent, procures the Patron to Present him upon a *Simoniacal* Contract, although that the After Incumbent be not privy to the Contract, yet he comes in by Simony; and so it is, where the Incumbent makes a *Simoniacal* Contract with the Friend or Wife
- (o) Hill. 11 Jac. B. R. Sir Will. Boyers Case Resolved.
- (p) Pasch. 17 Jac. B. R. *Lapthornes Case*. Bath vers. *Potter* Rol. Rep. par. 2.
- (q) Hill. 21 Jac. Rot. 1058. *Wilson* vers. *Bradshaw*. Rol. Rep.
- (r) Mich. 42 & 43 Eliz. B. R. *Baker* and *Rogers* Case. Cro. par. 1.
- More* Case 1223.
- Mich. 13 Jac. B. R. Cro. pa. 2.

of the Patron, and the Patron knows not thereof, and the Incumbent be Presented by the means of him with whom the Contract was made, it is Simony within the Stat. of 31 Eliz. and the King shall Present.

(30.) A man who was Presented by Simony, Libelled in the Ecclesiastical Court for Tithes. The Question was, whether the Simony should be tried in the Ecclesiastical Court, or by the Common Law; the Point was not resolved. Note there Simony is defined to be *studiosa voluntas emendi vel vendendi Spiritualia vel Spiritualibus annexa*—and it is either *Mentalis vel Conventualis*, of both which the Ecclesiastical Law may Judge, but the Temporal Court only of Conventual Simony.

Clofe's Case.
More's Rep.

(31.) In Sir William Boyers Case for a Prohibition to the High Commission Court, for their examining there upon Oath in Case of Simony, it was said by Coke Chief Justice, that Simony is worse than Felony; it is an enormous offence, if money be paid, for to Present one to a Benefice, although it be not paid to the Patron, neither had he any knowledge of it, yet the Incumbency for this shall be avoided; and the Patron also shall lose his Presentation *pro hac vice*. The Statute of 31 Eliz. cap. 6. is so strongly penn'd against the Incumbent, that if the Patron be privy unto it, he shall also be punished: an Action of Debt was brought in C. B. the Defendant in Barr pleaded, that the same was entred for payment of money for Simony; yet the Bond was held good; and we are not to take any notice of Simony, this being punishable in the Ecclesiastical Court, and if they there meddle only *pro salute Animæ*, they are not then to be Prohibited; Otherwise it is, when they will there examine the person upon an Article tending to the Title of the Patronage, there, in such case a Prohibition lies.

Hill. 11 Jac.
B. R. Bulstr.
par. 2.

(32.) In Case of the King against Zakar and others. It is said that if one be Presented by Simony, and the same person afterwards obtain a Presentation from the King, this is not good, for he is now a disabled person to take this Benefice, he hath a Leprosie upon him by the Statute of 31 Eliz. cap. 6. Like unto that of Gebazi. And Coke Chief Justice there declared, that notwithstanding the King saith, that the said Incumbent shall continue, yet the King shall have the next Presentation.

Pasch. 13 Jac.
B. R. Bulstr.
par. 3.

(33.) The Lord Windsor seised of an Advowson, granted the next avoidance thereof to Doctor G. the Church void, R. F. the Father of H. F. dealt with Doctor G. to permit the Lord Windsor to Present H. F. who knew not of the Agreement, who was Presented, Instituted, and Inducted accordingly. Resolved, That this was Simony, and that the King was to Present by the Statute of 31 Eliz. The King Presented J. S. who was Instituted and Inducted.

Pasch. 17 Jac.
B. R. Booth and
Porter's Case.
Cro. par. 1.

ducted. *R. F.* the Father sued *J. S.* before the High Commissioners for Misdemeanors, and procured him to be deprived, and Ten days after procured a Grant of the next avoidance to *J. N.* and after the deprivation within Ten days procured the said *J. N.* to Present the said *H. F.* &c. *Resolved*, that the said Presentation of the said *H. F.* was merely void, and that he was a Person disabled by the express words of the Statute to accept of that Benefice.

*Risby and
Wentworth's
Case.*
Cro. par. 1.

(34.) For a Prohibition upon a Suit for Tithes, supposing the Parson had come in by Simony, and thereby the Church void, and the Tithes not belonging to him: It was *Resolved* by the Court, a Prohibition could not lie, for that Simony might more aptly be tried in the Ecclesiastical Court.

Trin. 41 Eliz.
*B. R. Smith
and Shilborne.*
Cro. par. 1.
vld. More.
Case 1229.

(35.) The Incumbent of a Church being sick, the Father Contracts with the Patron in the presence of his Son, for the next avoidance for the Son, and agreed to give him One hundred pounds. The Grant is made, the Incumbent died; the Son is Presented, Instituted, and Inducted; being sued for Simony in the Ecclesiastical Court, he prays a Prohibition, and alleges the General Pardon 39 Eliz. which is after the Institution and Induction, wherein Simony is not excepted. In this Case it was *Resolved*: (1.) That although the Pardon discharges the punishment of Simony, yet he may be examined of it by the Ordinary, and deprived for it: But it was (2.) *Resolved* in this Case, there was no Simony, for the Father might buy the next avoidance and Present his Son, and it is not Simony in any to buy an Advowson; therefore the Prohibition was granted.

Mich. 11 Car.
*B. R. Bryte and
Mannings Case.*
Cro. par. 3.

(36.) In Debt upon an Obligation to perform Covenants, That *T. B.* Son of *W. B.* should Marry *A.* the Defendants Daughter: In consideration of which Marriage, the Defendant amongst other Covenants, Covenanted, that he would procure the said *T. B.* to be Presented, Instituted, and Inducted into such a Benefice, upon the next avoidance of the Church, and the breach was assigned, for non performance of the said Covenant, in procuring him to be Admitted, Instituted, and Inducted: It was demurred to by the Defendant, because the Covenant is against Law, being a *Simoniackal* Agreement, and a Bond for performance thereof is not good. *Resolved*, if it had appeared to have been, that in consideration of the Marriage of his Son, he would procure him to be Admitted and Instituted into such a Benefice, that had been a *Simoniackal* Contract, and had avoided the Obligation; but here this Covenant is not in consideration of the former Covenant, nor depending thereon, but it is a meer distinct Covenant of it self, and independent upon the former; and without a special averring or shewing that it was a *Simoniackal* Contract, it shall not be intended, but it may be a Covenant

Covenant upon a good consideration. And it was adjudged for the Plaintiff.

(37.) In the foresaid Case of the King against *Zakar. alias Secker* and others, it was said by *Coke* Chief Justice, that it is put for a Rule in *Green's Case*, that if one presents *Simoniace* to a Church of the Kings, and the King afterwards presents, *jure Simoniace*, this is a void Presentment, because he hath mistaken his Title, but he ought to Present *jure Patronatus*, not *ratione Simoniace presentatus*. And as to the disability of a *Simoniacal* person by the Statute of 31 *Eliz. c. 6.* Four things are to be observed upon this Statute. (1.) The Presentation to be void. (2.) The King to have his Presentment. (3.) A Fine to be imposed by way of Forfeiture. (4.) The Party presented to be utterly disabled. For where there is matter of Simony, if there be Fraud in the Incumbent, or if mony be given for the Presentation, though it be unknown to the Incumbent, to this let the Patron look; the Incumbent shall be removed. In this Case the whole Court agreed clearly in this, that the Parson party Presented by Simony, the Presentation is meerly void, and that the so Presented is utterly disabled for ever by the Statute of 31 *Eliz. c. 6.* to take the same Benefice, to which he is Presented by Simony, and that he is incapable to have another Presentation to the same Benefice.

(38.) The words [*Present or Collate*] in the Stat. of 31 *El. c. 6.* are not intended (says the Lord *Coke*) only where the person Presenting or collating, hath right to Present or collate, but also where any person or persons, Bodies Politick or Corporate, do usurp and have no title to present or collate; and that so it was adjudged in case where the usurpation was to a Church of the King. *Sed quando Præsentatio & Jus Patronatus sunt Temporalia. Quæritur quomodo sit Simonia per donum pecunie pro illis? Respondendum est, Quod Jus Patronatus & Præsentatio dicuntur Spiritualia, respectu rei, ad quam præsentatur, quæ Spiritualis est. Vide Lindw. cap. de Jurejurando fo. 80.* He says further, that there is a diversity between a Presentation or Collation made by a rightful Patron and an Usurper. For in the Case of a rightful Patron, which doth corruptly Present or Collate, by the express Letter of the Statute the King shall Present: But where one doth usurp, and corruptly Present or Collate, there the King shall not Present, but the rightful Patron: For the Branch that gives the King power to present, is only intended, where the rightful Patron is in fault; But where the rightful Patron is in no fault, there the corrupt act and wrong of the Usurper maketh the Benefice, &c. void, but taketh not away the Lawful Title to Present from the rightful Patron. And so it was adjudged *Mich. 13 Jac. in Quare Impedit*, between the King and the Bishop of *Norwich. Tho. Cole*, and *Rob. Secker*, for the Vicarage of *Haverel* in *Suffolk*.

N n n n

(39.) The

(39.) The Canon Law looks upon Simony as a kind of Heresie, *imo Simoniacos veluti primos & præcipuos Hæreticos: Rebuff. de Simonia in Resign. nu. 12.* and excommunicates all *Simoniacs* to that degree as not to be absolved but by the Pope himself, nor by him till at the point of death. — *extr. ibid. cum sit detestabile de Simonia.* And are *ipso jure* deprived of that Benefice wherein the Simony was committed; — *extr. ibid.* And this holds true as well where the Simony is only *Conventional* or by Compact, as where it is real & *per pecuniam numeratam*; albeit there are some *DD.* who will not agree that a meer *Conventional* Simony should incur a Deprivation, although they contest it not as to the real Simony, *viz. cum aliquid datur. Cassad. in Decis. 5. de Const.* But in the Council of *Constance* (touching this matter) there is nothing said *de datione* as to Deprivation, but only to Excommunication; whether therefore it be a *Conventional* or a *Real Simony*, a Presentation or Collation in consequence of either is *ipso jure* void and null, according to that Law, *Rebuff. ibi sup. nu. 10.* It is worth an *Asterisk* to observe, what an excellent exposition *Rebuffus* the Canonist to this purpose makes on *Matth. 21. 12.* (possibly more like a Lawyer than a Divine) he says that by the *sellers of Doves*, is there meant, such as endeavour to make sale of the Sacred Imposition of hands; And by the *Money-Changers*, are intended, such as sell Ecclesiastical Benefices; And pleasing himself in this conceit, breaks out into a Piece of Eloquence, *viz. Nusquam reperitur, (quod sciam) Dominum tanta severitate, tam districta censura Justitiæ peccatores corripuisse, non solum eloquio increpans, verum etiam facto flagello de funiculis verberans omnes eliminavit de Templo;* and thence most infallibly infer, that our Lord and Saviour Jesus Christ the Redeemer of Mankind, did cast out of the Temple all *Simoniacal* persons, and such as sell and make Merchandize of Ecclesiastical Benefices. — *Rebuff. de Elect. derog. lit. d. in verb. Non-nullæ.*

(40.) This most detestable Evil of Simony, may possibly (though rarely) be found in *Ordinations*; yet it is most frequently negotiated in *Presentations* (*Roman Elections* and *Postulations*) *Collations*, *Resignations*, and *Permutations* of Ecclesiastical Benefices. It is supposed that it hath it's denomination from *Simon Magus*, for these three Reasons, (1.) Because he was the first, that in the New Testament we meet with, that was ever infected with that Crime. (2.) Because he was the Superlative Offender in this kind above all others that were, anciently guilty thereof, for (as *Augustine* saith) he would buy the *Holy Ghost* on purpose to sell the *Holy Ghost*. But those that went before him, sold only some created Spiritual thing, as *Balaam* would have sold his Prophecie;

Prophetic; and Gehazi Servant to Elisha, that health which he obtained from a Divine Power for Naaman the Syrian. (3.) Because Simon seemed obstinately to persist in supposing this thing to be Lawful, and so therein he thence became a Heretick, and as such is generally condemned by the Fathers. The Definition which Panormitan makes of Simony seems defective according to Lessius and other Modern Authors; Panormitan defines it (as aforesaid) to be *Studiosam voluntatem emendi vel vendendi aliquid Spirituale, vel Spiritualis annexum, opere subsecuto*. But to make the definition adequate to the thing, there should be added to it (*pretio temporali*) for it is supposed, that if one Spiritual thing be given for another, in that Case it is not properly Simony, because the Turpitude of this Evil consists in this, that Spiritual things, which in their own Nature are inestimable, are here estimated at a Carnal, Humane, or Temporal price, which value or price the Law makes threefold, *viz. Pretium muneris*, as Money, or ought else that may be sold for Money: *Pretium Linguae*, as undue and undeserved Praise, or immoderate Flattery; *Pretium Obsequij*, as some service done, or to be done for the Patron in matters Temporal; or as when a Chaplain serves a Bishop domestically without any Stipend or Sallary, or remits it on purpose that a Benefice may be bestowed on him; which by the expresse Letter of the Canon Law is no other than Simony. *c. sunt nonnulli. 1. q. 1.* So likewise as to the *Pretium Linguae*, that Law is expresse against it, That *Rogans pro indigno ut Beneficium obtineat, Simoniam committit; dict. c. sunt nonnulli. & c. tuum, de atat. & qualit.* As to that Mental Simony which Navarr. cap. 23. nu. 102. and Cajetan also, *verb. Simonia*, and others would have to be one Member of the Distinction thereof, it seems to be wholly rescinded by the two last words of the Definition, *opere subsecuto*. It is also the more received Opinion among the DD. that to resign a Benefice into the hands of the Ordinary in favour of a Third Person, with this Clause (*non aliter nec alias*) is Simony; the Reason they give is, *quia omnis pactio in spiritualibus Simoniam continet. cap. fin. de Pactis. & cap. ex parte. 1. de Offic. Deleg.* To conclude, the Canon Law in this point of Simony is of a far wider extent than the practice with us is capable of comprehension; remembering therefore we are in an *Abridgment*, we may abuse the Reader in perplexing him with Exotick Questions in reference to this Subject, As whether every Sale or Exchange of Spirituals for Temporals be Simony? Whether an Exchange of Spirituals for Spirituals be Simony? Whether there be any Simony *Jure Humano*, and by what Contracts it may be discerned? Whether

the Pope may be *Simoniacal*. Q. Whether it be Simony to give Money for the Sacrament upon a Death-Bed? Whether it be Simony in the Ordinaries or their Officials to take Money for Letters of Ordination under Seal? Whether it be Simony in Ecclesiastics to take Money for Sermons or Theological Doctrines? Whether it be Simony to resign a Benefice, reserving a Pension out of it? Whether it be a Simony to resign or bestow a Benefice upon Trust or Confidence? With divers other such Questions in the Canon Law relating to this Subject, the Solutions whereof are not of any moment to us who are out of the Pope's Diocels.

CHAP. XL.

Of Blasphemy and Heresie.

1. What Blasphemy is, and whence so called.
2. The several punishments inflicted on Blasphemers.
3. How many ways Blasphemy may be.
4. What Heresie is; a Conjectural derivation of that word Heresie; it is Threefold.
5. What shall be accounted Heresie; what the Lollards of old were, and why so called.
6. In whom the Jurisdiction of Heresie properly resides.
7. A Heretick convicted, and so persisting, whether according to Law combustible; The reason of that severe Law; Heresie is *Lepra animæ*.
8. An Alphabetical black Catalogue of Hereticks; their Errors, Heresies and Blasphemies; and the times wherein they pestered the World.
9. A Catalogue of the Jewish Hereticks, but not in any Alphabetical manner as the former.

(1.) **B**LASPHEMIA, *Βλασφημία*; *μαρτὴν τὴν ἐναντίον τοῦ Θεοῦ* *quod lædat famam* *βλασφημεῖν* is as it were *βλάστην τὴν αἰσῶν*, to hurt anothers fame or reputation: *Suidas* interpreteth *βλάσφημος* ὁ οὗς Θεὸν ἕνεκεν ἕλκει, one who injureth God with contumelious words, which is when men detract from God the honour due unto him; or attribute any evil to him. *Blasphemia* re, est tacite vel expresse, verbo vel scripto, contra Deum aliquid contumeliosum dicere. *Novar. cap. 12, nu. 18.* *Blasphemia est injuri-osa in Deum locutio, vel contumelia in Deum verbo irrogata.* *Less. lib. 2. de Blasph.* This is cognizable in the Ecclesiastical Jurisdiction, and by the 109 Canon of the Ecclesiastical Constitutions of the Church of England, is among other notorious Crimes to be certified into Ecclesiastical Courts by way of presentment, in order to punishment according to Law.

(2.) This Crime of *Blasphemy* was so odious to the Emperor *Justinian*, that he ordained, that the Blasphemer should undergo *ultimum supplicium*, be punished by the death, for he made it capital. *Auth. ut non Luxur. Coll. 7.* By the Ecclesiastical Laws of *Keneth* (a) *L.L. Eccl. Kenethl. l. 7.* King of *Scots. An. 840* It is provided, that he that Blasphemeth shall have his Tongue cut out (a). *Blasphemy* is speaking Treason against

(a) *L.L. Eccl. Kenethl. l. 7.*
Spelm. Concil. Aa. 840.

against the Heavenly Majesty, the belching out of execrable words against God, whereby the Diety is reproached. *Baldus* says that Blasphemy is a kind of Heresie. *Bald. in L. Qui accusationem C. Qui Accus. non posse.* for which a Lay-man is Anathematized by the Church of God, and a Clerk deposed from all Ecclesiastical Orders. *Can. si quis per capillum. 22. q. 1.* The Canon Law seems not severe enough in the punishing of this Crime, probably for that they of the Roman Church do hold, that there is a Blasphemy against Saints, and *Blasphemia Dei vel sanctorum* hath but one and the same punishment with them, and that is a solemn and publick penance if the Blasphemy were publickly committed. *Extra de Maledict. c. statumus.* And that the World may know how they abominate this sin of Blasphemy, they put the Question and Demand, whether any Priest inferior to a Bishop, can absolve a man from this sin? For answer they distinguish and say, that if the Blasphemy be publick and notorious, it cannot be absolved but by a Bishop: but if it were only private and occult (*non in platea, nec in camera multis audientibus*) then every Priest may absolve it. *Ani. de p. c. & re. si Episcopus lib. 6. Steph. de Gaeta Repet. in c. ad Liminia 30. q. 1. nu. 139.* *Aquinas* reckons it among the Mortal sins.

(3.) *Lindwood* in his *Provincials* says, that that is Blasphemy *quæ dicitur irreligiosa reprehensio, detractio, vel vituperatio*, but (says he) to speak properly and strictly, *Blasphemare, est Deo injuriam irrogare*, which may be done three several ways, (1.) *Aliquid attribuendo, quod Deo non convenit.* (2.) *Ab eo removendo quod Deo convenit.* (3.) *Creaturæ attribuendo illud quod est proprium Deo.* *Lindw. de Offic. Archipr. c. 1. verb. Blasphemia.* In the Primitive times this sin was punished by a delivering the Offender over unto Satan, which was an Ecclesiastical censure by the Greater Excommunication, whereby the Offender became unto others as an Heathen and a Publican. *Mat. 18. 17.* and whereby he is disfranchised of all the Priviledges of the Church.

(4.) Touching Heresie, there are various conceptions as to the derivation of that word; some are of opinion that the word comes from *Error* and *rectus*, and that from thence comes [*Hæreticus*] that is *Errans a Recto sive Rectitudine Fidei Catholicæ. l. 2. in fin. C. de Hæretic.* Others will have the word *Hæresis* to be from [*berisor*] that is [*divido*], and thence Heresie to be *Divisio ab unitate Fidei. Azo. Sum. C. eod. tit.* Others will have it to be from [*hæreo & Error*], thence *Hæresis, quasi adhæsis Erroris*, and *Hæreticus, quasi adhærens Errori*, for *Error* of it self doth not make an Heretick, but adhering to an *Error* doth. *Lindw. Hæret. c. 1.* And others there are, who do conceive that the word [*Hæresis*] *dicitur ab Electione*, because an Heretick doth *chuse* to himself that Opinion which

1 Cor. 5. 5.
1 Tim. 1. 2.

which he thinks is best for himself (b). And he that inclines to this Opinion seems to be least in Error, for *Hæresis* is from the Greek *(1) Hieron. Epist. 24. q. 4. 3. Hæresis.* *ἀρεσις* *Optio, vel electio, secta, ab ἀρεσῖν Eligo.* *Hæresie* is an Opinion repugnant to the Orthodox Doctrine of the Christian Faith, obstinately maintain'd and persisted in by such as profess the Name of Christ. That Heresie which is commonly called *Hæresis universalis*, Heresie in sensu largo is threefold, and doth consist either in a mans heart, or in his mouth, or in his works. Under the first of these are comprized all such as are Christians only by Name, but not so in truth and in deed: Under the second are comprehended all vain Swearers, Covenant-breakers, and indevout approachers to God in his Worship: Under the third are contained all Hypocrites, whose counterfeit Devotion without any sincerity in the heart, consists only in the simulation of an external work; all these are by *Lindwood* understood in a large sense as Hereticks; *Lindw. de Offic. Archipr. c. 1. gloss. in ver. Hæresis.* But these are not the Hereticks here meant or intended, nor indeed are they Hereticks in any proper sense, whereby we commonly understand such as Hereticks, who maintain and persist in any Opinion contrary to the True, Orthodox, Catholick Faith, or any of the Articles thereof grounded on the word of God.

(5.) By a Proviso in the Act of 1 Eliz. c. 1. no matter or cause shall be adjudged Heresie, but such only as hath been so adjudged by the Authority of the Canonical Scriptures, and by the first four General Councils, or by any other General Council, wherein the same was declared Heresie by the express and plain words of the Canonical Scripture, or such as shall hereafter be determined to be Heresie by Parliament, with the assent of the Clergy in their Convocation, as appears by the said Statute; the occasion of the making whereof was (as is supposed) by reason of an Indictment against certain persons called *Lollards*, upon the Statute of 2 H. 4. c. 15. Whose Opinions were (1.) That it was not meritorious to go in Pilgrimage to St. Thomas, nor to St. Mary of Walsingham. Nor (2.) To adore the Image of a Crucifix or of Saints. Nor (3.) To confess sins to a Priest, but to God only, &c. *Lollards from Lollum Darnel or Tares.*

(6.) Sir Ed. Coke in the third part of his Institutes cap. 5. doth assert, that both by the Books at Common Law, and by History it doth appear, that an Heretick may be convicted before the Archbishop and other Bishops, and other the Clergy at a General Synod or Convocation. *Bract. lib. 3. fo. 123, 124. in Concil. Oxon. Newburgh. l. 2. c. 13. 6 H. 3. Stow. Hol. 203. 2 H. 4. Rot. Parl. nu. 29. Sautries Case F.N.B. 269. 2. 1 El. c. 1.* And the Bishop of every Diocels may convict any for Heresie, and so might have done before the Statute of 2 H. 4. c. 15. (c). For the Diocesan hath Jurisdiction on Heresie, and so it was practised in all Queen Elizabeths Reign: and accordingly *(c) Co. p. 3. Inst. c. 5.*

accordingly it was resolved by all the Justices in the Case of *Legate the Heretick (d)*; And that upon a conviction before the Ordinary of Heresie, the Writ *de Hæretico comburendo* did lie (e). Without the aid of the Act of 2 H. 4. c. 15. it seems the Diocesan could imprison no person accused of Heresie, but was to proceed against him by the censures of the Church. And now (says the Lord Coke in the forecited place) in as much as not only the said Act of 2 H. 4. but also that of the 25 H. 8. c. 14. are repealed, the Diocesan cannot imprison any person accused of Heresie, but must proceed against him as he might have done before these Statutes, by the censures of the Church, as it appears by the said Act of 2 H. 4. c. 15. according to Sir Ed. Coke in that place aforesaid, where he also saith, that no person at this day can be indicted or impeached of Heresie before any Temporal Judge, or other that hath Temporal Jurisdiction. But every Archbishop of this Realm may cite any person dwelling in any Bishops Diocess within his Province for causes of Heresie, if the Bishop or other immediate Ordinary thereunto consent, or if that the same Bishop or other immediate Ordinary or Judge do not his duty in punishing the same (f).

(d) By Fleming Chief Justice, Tanfield Chief Baron, Williams and Coke Justices Hil. 9 Jac.

(e) Mar. Hammond. 21 Eliz. Roll. 1579. Stow. 1161. Co. ubi supra.

(f) 23 H. 8. 9. & Co. ubi supra.

(7.) Again, Sir Ed. Coke in the forementioned place affirms, that it appears by *Bracton*, *Britton*, *Fleta*, *Stamford* and all the Books of the Common Law, that he who is duly convicted of Heresie, shall be burnt to death. *Mir. c. 4. de Majest. Bract. ubi supr. Britt. c. 9. Fleta l. 1. c. 35. Reg. F. N. B. 269.* But the Ecclesiastical Judge cannot (as he says) at this day commit the person that is convicted of Heresie, to the Sheriff (albeit he be present) to be burnt; but must have the Kings Writ *de Hæretico comburendo* according to the Common Law. *F. N. B. 269. Rot. Par. 2 H. 4. nu. 29, Sautries Case, Bre. de hæret. Combur. per Reg. & Concil. in Parlim.* The reason Sir Ed. Coke gives, wherefore Heresie is so extreemly and fearfully punish'd is, for that *Gravius est æternam quam temporalem Ladere Majestatem*; And *Hæresis est lepra animæ* (g). The party duly convicted of Heresie, may recall and abjure his Opinion, and thereby save his life, but a relapse is fatal. And if the Heretick will not (says he) after conviction abjure, he may by force of the said Writ be burnt without abjuration (h). 2 H. 4. Rot. Parl. N. 24. A Writ was issued by the advice of the Lords Temporal in Parliament to the Sheriffs of London, and subscribed *per ipsum Regem & concilium in Parlamento*, by which the Sheriffs were commanded to burn *William Sautre*, who had been before condemned for a relapsed Heretick by the Archbishop of *Canterbury Apostolicæ sedis Legatum*, and other Suffragans, and all the Clergy of that Province, *in Consilio suo Provinciali Congregat. juris ordine.* Note *1 Eliz. cap. 1. Proviso*, that such as have Jurisdiction by Letters Patents

(g) 2 Mar. tit. Hæresis. Br. 7. Co. ubi supr.

(h) Co. ubi supr. & 2. Mar. Co. ubi supra.

tenits, shall not have power to judge *Heresia* but in such Cases as have been before adjudged, &c. or such as shall hereafter be ordered, judged, and determined to be *Heresia* by the High Court of Parliament of this Realm, with the assent of the Clergy in their Convocation, as aforesaid. Before a Man shall be adjudged an *Heretick*, he ought to be convicted by the Provincial Synod; for the Common Law doth not take notice what is *Heresia*. If an *Heretick* convicted shall after abjuration relapse into the same or any other *Heresia*, and thereof be convicted again, the Writ *De Heretico Comburendo* may be directed to the Sheriff after the party is delivered by the Clergy unto the secular Power. And by the Statute of 2 H. 4. c. 15. Every Bishop in his own Diocess might (as aforesaid) convict a Man of *Heresia*, and upon another conviction after abjuration might by the Sheriff proceed unto combustion. But that Statute is repealed by the Statute of 25 H. 8. c. 14. *vid. Co. lib. 12. in a Case of Heresia. Note 2 Mat. tit. Heresia. Brook per omnes Justiciarios & Baker & Hare.* The Archbishop in his Province, in the Convocation, may and doth use to convict *Heresia*, by the Common Law, and then to put them convicted into Lay-hands, and then by the Writ *De Heretico Comburendo* they were burnt; but because it was troublesome to call a Convocation, It was ordained by the Stat. 2 H. 4. cap. 15. That every Bishop in his Diocess might convict *Hereticks*. And if the Sheriff was present, he might deliver such to be burnt without the Writ aforesaid; But if the Sheriff were absent, or he were to be burnt in another County, then the said Writ ought to be had, who are *Hereticks*, *vid. 11 H. 7. Book of Entries, fol. 319. vid. Doctor and Stud. lib. 2. cap. 29. Cosin. 48. 21. & 2 P. & M. cap. 6. Also F.N.B. fol. 269.* And the Writ in the Register proves this directly, 4 *Bracton* l. 3. cap. 9. fol. 123, 124. And it is also true, that every Ordinary may convent any *Heretick* or *Schismatic* before him *pro salute animæ*, and they degrade him, and enjoin him Penance according to Ecclesiastical Law; but upon such conviction the party shall not be burnt. *Note* (says the Lord Coke in the same place) that the makers of the Act of 1 Eliz. were in doubt what should be deemed *Heresia* or *Schism*, &c. and therefore the Statute of 19 Eliz. provides, that nothing shall be deemed *Heresia*, but what had been so determined by one of the four General Councils, the word of God, or Parliament, *vid. Fox in Ed. 6. and Britton. 5 Ed. 1. lib. 1: cap. 17.* and with this agrees the Statute, 2 H. 5. cap. 7. 23 H. 7. 9. 25 H. 8. c. 14. The proceedings in the commencement and end was altered by the Stat. of 25 H. 8. Then came the Statute 1 Ed. 6. cap. 12. and that repealed 5 R. 2. 2 H. 5. and 26 H. 8. and the 2 H. 4. and by general words all Statutes concerning matter of Religion; then the 1 & 2 P. & M. cap. 6. Revi-

F.N.B. 269.

ved the 2 H.4. by which the 15 H.8. lost its force, the Act 1 and 2 P. and M. cap. 8. expressly repealed 21 H.8. 23 H.8. 24 H.8. 27 H.8. but the 25 H.8. cap. 14. was not repealed, being repealed before by the 1 Ed. 6. yet in the end of that long Act there is a general Clause sufficient of it self to repeal the Act 25 H.8. cap. 14. without more. Then the 1 Eliz. cap. 1. repeals the 1 and 2 P. and M. except some Branches; and in the same Act is enacted, that all other Statutes repealed by the said Act of Repeal 1 and 2 P. and M. and not in this Act specially revived, shall remain repealed. But the 25 H.8. cap. 14. was not particularly revived, and therefore remains repealed. And after the said Statute 1 Eliz. repeals the Act 1 and 2 P. and M. of reviving of three Acts for punishment of Heresies; so that now at Common Law (according to the Lord Coke) none can be burnt for Heresie, but by Conviction at a Convocation. After this, viz. Hill. 6. Jac. the Attorney and Solicitor consulted with him whether at this day, upon Conviction of an Heretick before the Ordinary, the Writ de Heretico Comburendo lieth, and it seemed to him to be clear that it did not, for the Reasons and Authorities that he had reported Trin. 9. Jac. before. But after they consulted also with Fleming Chief Justice, Tanfield Chief Baron, and Williams and Crook Justices: And they upon the report of Dr. Cosins, and some Presidents in Queen Elizabeths time, certified the King that the said Writ lieth (i).

Hill. 9. Jac.
Co. lib. 12.

(N) Co. lib. 12.
Case of Heresie.

(8.) Since the Devil in his Serpentine Polkey first negotiated the fall of Man, there have ever been such as have gone forth, like the lying Spirit is Abahs false Prophets, whereby many, as he was, are deceived to their own ruine; these are the Devils Emissaries, Active in sowing Tares among the Wheat, whom we commonly call Hereticks, a black Catalogue whereof in an alphabetical Method here follows:

An. 491.

Acatiani and *Semi-Arian*, they held that the Son was a Creature made by the Father, and that Christ was like to the Father in Will but not in Substance. This Heresie began by *Acatius* (not the *Eurychian*) Bishop, and Successor to *Eusebius* in *Cæsaria*; and was condemned in the Council of *Seleucia*.

A.D. 353.

Acephali, so called because they had neither Bishop nor Priest for their Head, and were Branches of the *Eurychian* Heresie. They rejected the Council of *Chalcedon*, and denied the two Natures of Christ. They despised all Congregations and the Sacraments.

An. 174.

Adamiani; so called from their going naked in their Assemblies (in imitation of Adam in his Innocency) to which Estate they said Christ had restored Mankind. They condemned Marriage and had Women in common, with whom they lay promiscuously after the Light put out. They held that we ought not to pray to God, because he knows our wants without Prayer: And called their Assemblies

sembles that *Paradise* which God had promised to the Blessed. They had their Conventicles in subterranean places, called *Hypocausta*, because that under the place of their Meetings, a Furnace of Fire was kindled to warm the same, where they unclothed themselves when they entred into it, and stood naked, both Men and Women, in imitation of *Adam* and *Eve* before the Fall. This Heresie was first broach'd by one *Prodicus a Gnostick*. There was also the Heresie of *Adamites*, promiscuous in their Lusts, begun or rather revived by a *Picard* of *Gallo-Belgia* in the year 1341.

Arius, a *Syrian* of *Amioch*, and Priest of that Church, successor to *Arius*, to whose Errors he added, and was degraded; and went into *Cicilia*, where he published them, and was banished by the Emperor, and recalled by *Julian* in hatred to the Christians. He held (besides *Arianism*) that God was comprehensible, and that *Christ* was unlike the Father in all things, and spake uncouth things of the Trinity, and was justly called an Atheist. He was condemned in the *Sclavonian* Council in the year 359 and confuted by *Epiphanius*.

An. 357.

Agnostæ, they held that the Divine Nature of *Christ* was ignorant of some things, as of the day of Judgment, and denied perfection of knowledge to the Son of God in his Divine Nature.

An. 601.

Almaricani, from *Almaricus* of *Carnotum* in *France*, who uttered Blasphemous opinions concerning God, that he was the Essence of all Creatures, and the Soul of Heaven, and that all Creatures should be converted into the Substance of God again: These Hereticks approved of all Uncleanliness under the Veil of Chastity.

An. 1202. 2A

Alogi, they rejected the Gospel, and the Revelation of *St. John*, saying that they were written by *Cerintus*, and denied *Christ* to be the Word, as also his Divinity.

An. 198.

Angelici, these Hereticks were Angel-Worshippers; *Epiphanius* who speaks of them, better knew their Name than the Original of their Sect.

An. 314. 2A

Anomæi, a Branch of the Stock of the *Arians*; the principal Authors were *Acatius*, *Eunomius*, and *Erius*. This was in the fourth Century; *Sozom.* l. 4. c. 22.

Anthropomorphitæ, these Hereticks were the Disciples of the *Audean* A. 370. and revived their Heresie, so called of *Audeus* a *Syrian*, who lived in the end of *Aurins* his time. They Blasphemously held that God had a Body like unto Man: That Darkness, Fire, and Water, were eternal; they refused the Congregation of the Orthodox Church & admitted grievous Sinners to the Communion without Repentance.

An. 932.

Antidicomarianitæ, these supposed that after the Nativity of our Lord, the Virgin *Mary* accompanied with her Husband *Joseph*, and did bear Children to him. *August. de heres.* of which opinion was *Helvidius*. It is said, that the opinion of the Fathers of our

the Church was, that as no Man did lie in the Sepulcher wherein *Christ* was buried, before him: So in the Womb wherein he was conceived, no Man was conceived after him; and that the Fathers by the words in the Apostolick Symbol understood, that he was Born of *Mary*, a perpetual Virgin: And that by the *Brethren of our Lord* in the Holy Scriptures, is meant (as is generally held) the Kinsmen of the Lord according to the Flesh.

An. 1556.

Antitrinitarians were those Hereticks who denied the Blessed Trinity.

Adapted to the text, these were a Branch from the Root of *Eutyches*; They supposed that the Flesh of *Christ* was void of all kind of Human Infirmary. The Emperor *Justinian* was said to be tainted with this Heresie in his old Age, by bearing so much with the Empress *Theodora*, to the great Advance of *Eutyches* his Error.

Apelles, a Disciple of *Marcion*, yet could not agree with his Master in all things; for he agreed that *Christ* had a true Body, but not made of the Substance of the Virgin *Mary*, but of the four Elements, and that after his Resurrection he dissolved into the four Elements, and then return'd to Heaven from whence he came. *Epiphanius*.

An. 372.

Apollinaris, Bishop of *Laodicea* in *Syria*, so *Ruffin*. l. 2. c. 20. yet it is said of him, that missing of a Bishoprick he fell into these Heresies, viz. That *Christ* had no Humane Flesh from the Virgin, but from Heaven: That he had a Humane Body, but not a Soul, confounding the Persons in the Trinity; That *Christ* had no Humane Will: That Souls begat Souls: That after the Resurrection, all the Ceremonies of the Law should take place among the Godly.

An. 482.

Apostolici, these Hereticks condemned Marriage, and held the Apostles to be all unmarried: They made all things to be common: They used Apochryphal Books for Gospel: They refused to receive those into the Church who had lapsed after Baptism: They would not have Possessions, but rejoiced in voluntary Poverty: And gave Sentence against themselves that they were unclean, because they were procreated by Marriage.

Aquarii, these were certain Hereticks, who instead of Wine received Water in the Holy Sacrament. This was in the days of *Cyprian*.

An. 324.

Arians, a *Lybian*, and a Priest or Presbyter of *Alexandria*, he said that *Christ* was neither God, nor Eternal, but an excellent Creature created before all Creatures: That he assumed only a Body, but not the Soul of a Man: That the Holy Ghost was a Creature of a Creature, viz. Of the Son: He Rebaptized, and perverted the Order of Baptism: He used the *Trisagion* thus,

Gloria.

Gloria Patri, per Filium, in Spiritu Sancto: He denied the Son of God to be begotten of the Substance of the Father, but that he was a Creature, and made of things not existent, and that there was a time wherein the Son was not: He was condemned in the *Nicene Council*, and banished by the Emperor *Constantine*.

Armenii, so called of the Province, where their Heresies raged, An. 609. by the means of *Eucbanus* called *Mantacunes*: They denied that *Christ* assumed his Humanity from the Virgin *Mary*: They celebrated the Passover after the Custom of the *Jews*: They held a Quaternity, and that the Divinity suffered.

Artemon, Bishop of *Bosra* in *Arabia*, denied the Divinity of *Christ*, and affirmed that he was not existent before he took Flesh from the Virgin. This was in the third Century.

Artotyritæ, they were of the Sect of the *Pepusians*, and added An. 186. Cheese to the Bread in the Sacrament.

Assitæ; these were Hereticks who carried about with them new Vessels, to represent that they were Vessels, filled with the new Wine of the Gospel.

Badesianistæ, these were but a Branch of the Heresie of the *Valentinians* and *Gnosticks*, who denied the Resurrection; these Hereticks were in the third Century.

Basilides, an Egyptian of *Alexandria*; he held fond Opinions An. 135. concerning the Creation and number of Heavens: That not *Christ* but *Simon* of *Cyrene* was Crucified: That it was lawful to deny *Christ* in time of Persecution, and to have Idols; That no Sins but such as are unwittingly committed should be pardoned: That Faith was natural: That Prophecies came not from God but Angels: And that there was no Resurrection.

Beryllus Bishop of *Bosra*, he was Orthodox at the first, but afterwards held that the Soul died with the Body, and both rose again together: That *Christ* was not before the Nativity. *Origen* reclaimed him. These Heresies were condemned in the *Arabian Council*, An. 249.

Caini, so called of the special Worship they attributed to *Cain*: An. 150. They revered *Esau*, *Core*, the *Sodomites*, yea and *Judas* himself, as Authors of Mans Salvation: They denied the Resurrection of the Body, rejected the Law, and worshipped evil Angels. *Tertullian* and *Epiphanius* say; That these Hereticks arose from the *Nicholaitans*, but *Irenæus* says they sprung out of the *Valentinians*.

Carpocrates of *Alexandria* in *Egypt*, he held that *Christ* was meer An. 142. Man, and Born of *Joseph* and *Mary*: he held also the transmigration of Souls; also that the Devil created the World, and denied the Resurrection. These damnable Heresies did spread in *Egypt*,
Asia,

Asia, and *Rome* under the name of *Gnosticks*: he lived incontinently with *Marellina*, one of his own Sect; his Son *Epiphane* succeeded him in his diabolical Heresie, and (after him) *Prodicus* the Author of the *Adamites*. The followers of *Carpocrates* had in secret places Images of Gold and Silver, which they called the Images of *Jesus*, and therewithal the Images of *Pythagoras*, *Plato*, and *Aristotle*, all which they worshipped. So that the worshipping of Images, and the adoration of the Image of *Jesus*, seems to be a Custom borrowed rather from the old Hereticks, than from the ancient Fathers of the first three hundred years. *Epiph. contra Heres.*

An. 251.

Cathari, they professed themselves purer than others, and held Rebaptizing those who sinned after Baptism, condemned second Marriage, and refused to receive those who had lapsed in time of persecution. The founder of these *Cathari* was *Novatus* ordained Priest of *Rome* by *Cornelius*, upon his repulse in a Bishoprick.

An. 144.

Cerdon of *Syria*, from whence he went to *Rome*, and in the time of *Heginus* broached these blasphemous Heresies, viz. That there were two Gods, one good, who was the Father of *Christ*, and another severe and bad, and this created the World. This *Cerdon*, as also *Marcion*, were the Authors of the Opinion of two Gods, or two beginnings: he denied the Resurrection of the Body, and invented a new Baptism after a Man hath been Baptized a second and a third time: he held that *Christ* was neither Born of the Virgin *Mary*, nor suffered really; with many other Blasphemies against him: he rejected the Law and often feigned to recant, but in the end was Excommunicated, having lived in *Rome* eight and thirty years.

An. 93.

Cerintus, a circumcised Jew, contemporary with *Ebion*, he affirmed that the World was not Created by God, but by an inferiour Power: That *Christ* was born after the manner of Men, of *Joseph* and *Mary*, denying her Virginitie; he divided *Jesus* from *Christ*, saying that *Christ* descended upon *Jesus* at his Baptism in the form of a Dove: That *Jesus*, not *Christ*, suffered and rose again: That there was a necessity of Circumcision, and that Life Eternal should be at *Hierusalem*, where all earthly Pleasures should endure one thousand years. The report is, that *St. John* finding him in a Bath, departed thence saying, that it was a Miracle that the Bath fell not down while *Cerintus* was in it. This Heresie began at *Antioch*, and spread over *Asia* and *Syria*; but this Name lasted not, though *Carpocras* and *Samoatenus* continued the Heresie.

Chiliasm or *Millenarius*, their Author was *Papias* Bishop of *Hierapolis*; whose Heresie was a Branch of that of *Cerintus*, in that point that *Christ* would raise the Godly first, and live a thousand years with them on the Earth. This Heresie was afterwards maintained by *Nepos*, an *Egyptian* Bishop, two hundred thirty one years after *Christ's* Passion. An. 116.

Circumcelliones, They were the most reprobate Branch of the *Donatists*: they would throw themselves headlong from high places, or cast themselves into fire and water, and counted it Martyrdom. *Aug. de Heres.*

Colarbasus, he was *Marcus* the Magicians fellow Disciple; and held that Mens lives and actions were ruled by seven Planets, and divided *Jesus* and *Christ* into two distinct persons.

Collyridiani, they offered Divine Honour to the Virgin *Mary*, and Sacrificed to her as to the Queen of Heaven; they worshipped her with Divine Adoration, and offered to her little Pasties baked. *Epphan.* An. 364.

Colutbians, they denied that any evil, either of sin or punishment was of God.

Donatists, from *Donatus* a Priest of *Carthage*, who missing the Bishoprick he would have had, did discontentedly fall into these Heresies, viz. That the true Church was no where but with him and his Disciples: That obedience to Gods Precepts ought to be voluntary and not compulsive: That no Hereticks ought to be punished by the Magistrate: he measured the effects of the Sacrament by the Minister, not by the Author: He rebaptized, used Incantations, and boasted of Revelations: He held the Son to be less than the Father, and the Holy Ghost less than the Son: His followers slew as many opposites to their Sect as they could: He was at last Bishop of *Numidia*. An. 307.

Ebion, from *Ebion* a *Samaritan*, their Founder, or from *Ebion* [Hebraice] Poor, they having made themselves so by distributing their Goods in Alms. They denied the Divinity of *Christ*, rejected *St. Paul's* Epistles and all the Gospels, except *St. Matthew's*; and held themselves bound to observe the Law of *Moses* as necessary to Eternal Life. *Euseb.* An. 87.

Ecclesai, of *Ecclesai* their Founder, they were also called *Sampsai*: They opposed the Virginity of the Virgin *Mary*, and held that there were two *Christ's*, one inferiour Born of her, the other superiour, also that the Spirit was Sister to *Christ*: They adored Water as a God: Held it lawful to become Apostates in time of Persecution, and approved of one only apocryphal Book made by themselves. They sprang from *Ebion* the Heretick. An. 210.

Encratiteæ, so called because they abstained from Wine, eating of Fleish, and living Creatures; they condemned Marriage, and blasphemed the Epistles of St. Paul; The Author of this Sect was *Tatyanus* a Syrian. *Euseb. l. 4. c. 28.*

An. 384.

Euchitæ, they held Baptism unprofitable.

An. 361.

Eunomius, Bishop of *Syricum*, an *Arian*, he added to the Heresies of *Aetius*; that the Holy Ghost was created by the Son; And that *Christ* assumed only a Humane Body, and not a Soul, he was confuted by St. *Basil.*

Ab. 447.

Eutyches, Abbot of *Constantinople*, confuting *Nestorius*, fell himself into other errors, and confounded the two Natures of *Christ*, making him (after his union) to have but the Divine Nature only, and held that he assumed nothing but Humane from the Divine: He affirmed also that the Divine Nature was passible, and that *Christ* was rather deified than God; He was condemned in the Council of *Chalcedon.*

An. 792.

Felix Bishop of *Urgel* on the *Pyrenean Hills*: He held that *Christ* in his Humane Nature was the adopted Son of God; He was condemned for Heresie at *Ratisbon*; hence came the *Felicians.*

An. 178.

Florians from *Florinus* or *Florianus* a Priest of *Rome*, he held that God created all Creatures and things in an evil state, and celebrated the Passover after the manner of the *Jews.*

Fratricelli, they were of Opinion, that a Man might in this World attain to a state of such perfection, that he might be altogether without Sin, and that he who had attained thereto, was neither under subjection to Civil nor Spiritual Governours, but was freed from all subjection to mortal Men, and that they had no need of Prayer nor Fasting. These were in the thirteenth Century and now also in the seventeenth Century are every where to be found among us, though under another appellation.

An. 1295.

Gazareni, called also *Patereni*, and *Gazari*, these were certain Hereticks about *Tbolouse* in *France* in the thirteenth Century, who held that married Men were not in a State of Grace, and could not be saved; This Opinion was condemned by the Council of *Lateran.*

An. 161.

Gnosticks, they assumed that name from the knowledge and learning which they proudly conceived they had above all others: They held (besides those Heresies of the *Carpocratians*) many other fond Opinions concerning the Creation by Angels; and affirmed that every faithful Man had two Souls; that there were two Gods, one good and the other bad; They distinguished *Jesus* from *Christ*: And held that *Christ* was eighteen Months upon Earth after his Resurrection. There were divers sorts of this Sect.

Godescalcus, one of the *Netherlands*, about the year eight hundred forty nine, perniciously held, that those who were predestinated unto life by a Decree of Gods Predestination, were necessitated to do well : and those who were predestinated to condemnation, were necessitated by a Decree of God to do evil. An. 849.

Helsesaitæ, the same with those formerly called *Elesai*, otherwise called *Sampsai* ; they mixed the Religion of the *Jews*, *Gemiles*, and *Christians* together : they rejected the Writings of the Apostle *Paul* : and affirmed that a man who denieth the Lord with his mouth in time of Persecution, if so be he adhered to the Faith in his heart, he had committed no sin : they carried about with them a singular Book, which they said was sent down from Heaven, and promised remission of sins to every man that would hearken to the words of that Book, these were of the third Century. *Epiphanius* contr. hæres. 2. & *Comment. Func. in Chron.*

Hermiani, they sprung from *Hermogenes* an *African*, and held that the Mass whereof the World was created, was coeternal with God : That Angels created mens Souls : That Christ ascending left his humane Flesh in the Son : They denied the Resurrection, and received not Baptism by water. An. 201.

Hieracitæ, of *Hierax* an *Egyptian* of *Leontopolis*, he spake of the Father as of two Lights, differing in substance : damned Marriage : denied the Resurrection : excluded Children from Heaven : held that *Melchisedec* was the Holy Ghost : and that Paradise was no Earthly place. An. 261.

Jacobitæ of *Jacob* a *Syrian*, called *Zänzalus*, for his poverty : They received the heresie of *Eutyches*. An. 607.

Jovinianus, a *Roman*, he held all sins to be equal : denied the Virginity of the Virgin *Mary* : Contemned Fasting, and all Spiritual Exercises : and held that Men did not sin after Baptism. An. 362.

Lucianistæ and *Appelliani*, so called from *Lucianus* and *Apelles*, Disciples of *Marcion*.

Lucifer Bishop of *Calaris* in *Sardinia*, he diabolically held, that Mans Body was formed by the Devil : That a Christian might kill himself, to be quit of the burthen of the flesh : and allowed but part of the Old Testament. An. 367.

Luciferniani, it is supposed that these were not from the former, but from another *Lucifer* : for some say, that these were rather Schismatics than Hereticks, and only held, that Faith was a Weapon of Contentions, and not of Heresies. *Theod. Compen. Hæres. Sozom. lib. 5. cap. 13.*

Lombardianians for want of another Name, for in the time of the Emperor *Albert* in *Lombardy* near to *Navarre*, there were a Sect

of Hereticks, who under colour of Religion and Charity made all things common, and Women in like manner moved Men to carnal conjunction, alledging it to be a deed of Charity. This was in the fourteenth Century. *Imp. Hist. pag. 522.*

An. 343.

Macedoniani, of *Macedonius* the *Arian* Bishop of *Constantinople*, They were sometimes *Semi-Arians*, at other times *Arians*, and sometimes Orthodox, but never constant. They held that *Christ* was not of the same Essence with the Father, but only like to him: And that the *Holy Ghost* was not God, but Gods Minister, and a Creature not eternal.

An. 274.

Manes, a *Persian*, otherwise called *Manicheus* in *Dioclesian's* time, Author of the *Manichees*, he was a devilish crack-brain-Fellow, and chose to himself twelve Disciples, and composed his Heresies out of divers others: He blasphemously affirm'd himself to be the *Holy Ghost*: he held two beginnings, the one good, the other evil: rejected the Old Testament, and mangled the New: denied *Christ's* Divinity, and his real Passion, and the Resurrection of the Body: Condemned Marriage, Alms, and Baptism: he most blasphemously said that *Christ* was the Serpent that deceived *Eve*: that *Christ's* Body was fixed in the Stars: That he redeemed the Souls: he forged many things about the Creation: he worshipped the Sun and Moon as Gods: attributed two Souls to every Man: he ascribed sin not to the free will of Man, and his natural defection voluntary, from the Estate of the first Creation, but to necessity, because Mans Body was made of the substance of the Prince of Darkness: with other fond and blasphemous Heresies. One *Seythianus* a *Sarazen* Merchant infused these Heresies into him. *Warranes* King of *Persia* hearing of his Fame, sent for him to cure his sick Son, who died under his hand; whereupon he cast him into Prison, from whence he made his escape into *Mesopotamia*; but there the said King retook him, flead him, fill'd his Skin full of Chaff, and caused it to be set up before the Gates of the City in *Mesopotamia*. *Euseb. lib. 7. cap. 30. & Socrat. lib. 1. cap. 22. Eccl. Hist.*

An. 341.

Marcellus Bishop of *Ancyra*, the Metropolis of *Galatia*, he held blasphemous Opinions against the Trinity, and denied the Divinity of *Christ*:

An. 166.

Marcion, the Disciple of the Heretick *Cerdon*: he held (besides *Cerdon's* Heresies) that *Christ* was not the Son of God: he held likewise the transmigration of Souls: That War was not lawful though on just occasion: he condemned Marriage: rejected the Old Testament: Forbad eating of Flesh, and allowed of Rebaptizing (*toties quoties*) as oft as Men fell and repented. *Polycarpus* called this *Marcion*, *Primogenitus diaboli*.

Marcus

Marcus a Magician, of whom came the *Marcitæ*; he invented a new form of Baptism, viz. In the Name of the unknown Father of all things, and in the Name of the verity of the Mother of all things, and in the Name of him who descended upon *Jesus*. He held that *Christ* suffered not, nor assumed a Body: he defiled the Sacrament, and was a Man of a very filthy life: denied the Resurrection of the Body, and supposed that Salvation belonged only to the Soul. An. 149.

Melchisedechiani, the Author of these Hereticks was *Theodatus* An. 258. Disciple to *Theodatus* the Currier: he held that *Melchisedec* was made by God greater than *Christ*; whose Divinity they also denied, and magnified *Melchisedec* above *Christ*.

Menander, Disciple and Contemporary with *Simon Magus*, a Samaritan and a Sorcerer, and Author of the *Gnosticks*; he held with *Simon* about the Creation by Angels, and affirmed that he was sent from Heaven to save the World; and that by vertue of his Baptism Men should not die nor grow old: but the success not answering his promise, his Heresie fell of it self. *Epiph. Euseb. Aug. & Theod. lib. 4. cap. 11.* An. 11.

Meletiani from *Meletius*, a Bishop of *Thebaida*, he was deposed for Sacrificing to Idols. This was in the fourth Century.

Messaliani, They worshipped God, but not in three Persons, and held that God might be seen with corporal Eyes; that the Devil ruled our actions. They attributed Salvation to Prayer totally: they contemned Christs Passion, and the Sacraments, Alms, and a laborious Life, and tolerated Perjury to promote Religion. An. 374.

Metangismonitæ, They held that the Son was in the Father, as a lesser Vessel comprehended in a greater: That God had Body, and in the Divine Essence was something greater and something lesser. An. 408. *Aug. out of Philaster.*

Monophysitæ, whose Author was *Dioscorus* Bishop of *Alexandria*, they were also called *Theopaschitæ* and *Monothelites*, who denied not directly the two Natures of *Christ*, but only affirmed that after the the Union of the Natures, there was only one Will and one Operation in *Christ*; they attributed the Divine Nature only to *Christ*; These were a branch of the *Eutychian* Hereticks. An. 451.

Montanus of *Phrygia*, Author of the *Cataphryges*, he affirmed himself to be the Holy Spirit, he called himself the

Holy Spirit, whom *Christ* sent to intrust his Disciples in all truth: He said that the Spirit fell but little upon the Apostles, and fully upon himself: He instituted Laws concerning Fasting, condemned second Marriage, allowed Incest, confounded the Persons in the Trinity, and baked Mans Blood with the Bread of the *Eucharist*: He seduced two Women *Priscilla* and *Maximilla* to leave their Husbands and to be his Prophetesses.

AN. 67.

Nazareni, they stiled themselves so, because that before the Name of *Christians* began, that Name was the most honourable among *Christ's* Disciples: They confessed *Christ*, but withall held a necessity of observing the Law, and framed strange things of *Ouria* or *Nauria* (*Noah's* Wife, as they would have it) or *Vessa*. They had many Gospels (as they called them) and boasted much of Revelations and Visions: They held that the Soul of a Man, of a Beast, of a Plant were all of one Substance. These Hereticks continued till after the time of *Epiphanius*, who reporteth that the *Jews* so hated them, that they prayed twice a day against them. *Epiph. Aug. Theodor. Isidor.*

AN. 428.

Nepotiani, from *Nepos*, a Bishop in *Egypt*, about the year, 264. They affirmed that at the later Day the Godly should rise before the Wicked, and should live with *Christ* a thousand years in abundance of all earthly Pleasures. *Euseb. lib. 7. cap. 24.*

Nestorius, Bishop of *Constantinople*, he spake against the Personal Union of *Christ's* Divine and Humane Nature, for he held that *Christ* had two several Persons, but not two Wills: That the Son of God in *Christ*, was but an Assistant to the Son of the Virgin *Mary*, whom he would not have to be called the Mother of God; but only the Mother of *Christ*. *Evag. l. 1. c. 7.* He held that the Humanity in *Christ* was made equal with the Diety or Divine Nature. He was condemned in the General Council of *Ephesus*, and died in Banishment, his Blasphemous Tongue being first eaten with Worms, which rotted in his mouth.

AN. 81.

Nicolaista, from *Nicolas* a Deacon of *Antioch*, chosen by the Apostles to look to the Poor, who being suspected to be jealous of his fair Wife; did (to clear himself) proffer her to any of the Brethren that would Marry her; Whereupon they took occasion to live promiscuously, making their Wives Common; and held that it was lawful to eat things offered to Idols: That Darknes and Light begat the World; of which were born Angels and Devils, and of them Men. This Heresie continued not long in this Name, but was published and revived by the *Gnosticks* and *Valentinians*. *Com. Alex. & Sirom. 3. Ad. 6. & Euseb.*

Isotimus,

Noetus, of *Smyrna*, Disciple to *Montanus*, he called himself *Moses*, and held but one Person in the Trinity: He being converted, abjur'd his Heresie; but afterwards being ambitious of a Name, relapsed and dispersed it, and when he died, was cast out unburied as not worthy thereof. An. 179.

Novatus, ordained a Priest of *Rome* by *Cornelius*, he was the An. 252.
 Founder of the foresaid Hereticks the *Cathari*: He held that such as had fallen in time of Persecution, were not to be restored to the Fellowship of the Church, albeit they repented thereof.

Ophite, of *Ophi*, a Serpent, whom they worshipped, affirming most blasphemously that Christ was the Serpent which deceived *Eve*: they denied Christ's Humanity, and the Resurrection: They held also a Blasphemous opinion concerning the Sacrament: This Sect was a Branch of the *Valentinians*, and continued till after the time of *Justinian* the first.

Origeniani and *Turpes*, of one *Origen* a *Gnostick*, who drew his An. 169.
 Heresie from *Epiphane*s Son to the Heretick *Carpocras*: They prohibited Marriage, but committed Fornication and all Filthiness, and rejected some Books of the Old and New Testament, which made against them. Some say they were foul and filthy Beasts, not abhorring Whoredom but Procreation of Children, to the end they might seem chaste, not unlike unto *Omam* whom the Lord slew. They were also called *Origenista*, because they defended the Books of *Origen*, who were *Theodorus Ascidas* Bishop of *Cæsaria-Cappadocia*, and the Monks of *Nova Laura*. There were of these Hereticks also in the sixth Century.

Palmerius, the Chronologer, he was burnt for his Heretical Opinion concerning Angels. An. 189.

Papins Bishop of *Hierapolis*; he was *St. John's* Disciple, yet afterwards became the Author of the Sect of the *Chiliassts* or *Millenarians*, whose Heresie was a Branch of that of *Cerintus*, in that Point, that Christ should raise the Godly first, and live a thousand years with them upon Earth. An. 1449.

Pataloryebite, a Foolish people, who counted it Religion to stop their breath with their Fingers, and not to utter any Intelligible Speech. An. 116.

Patarni and *Gazareni*, these Hereticks did hold that married men could not be saved. An. 1299.

Paterniani or *Patriciniani* and *Venustiani*, they were called by the first Name, of *Paternus* their Founder, and by the last, of their lascivious behaviour: They held that the lower parts of Man were not made by God, but by the Devil; others say that they affirmed that the whole Body of Man was formed by the Devil, and not by God.

Paulus

An. 267. *Paulus Samosatenus*, so called of *Samosata* the Metropolis of *Comagena*, where he was born: He held that the Word was not in *Christ*, otherwise than in the Prophets: That *Christ* was not the Word, and denied his Divinity: He Baptized not in *Christ's* Name.

An. 412. *Pelagius Brito*, whose Followers were *Julianus* and *Caelestius*, in the days of *Arcadius* or *Honorius*: This *Pelagius* was a Roman Monk, born in *Armorica* or *Little Britain*, who with his Disciple *Caelestius* spread his Heresies over almost all Countreys, viz. That *Adam* had died though he had not sinned; That his Sin did only hurt himself, and not others but in his Example: That Lust and Concupiscence, which is naturally in us, is good, and nothing in it whereof we need be ashamed: That Infants neither have, nor draw Original Sin from the Parent: That the Infants of the Faithful, thought not Baptized, shall be saved, but shall remain without the Kingdom of God: That Men have free Will sufficient to do Good, without the Grace of God: That Men by nature were able to fulfil the whole Law of God: Howbeit more easily and better if they were supported by the Grace of God. They denied Original Sin, and said that the Posterity of *Adam* were Sinners by imitation of *Adam's* Sin, but had not received Sin by carnal Propagation: That Children had no need to be baptized for Remission of Sins, and that the godly Fathers in Scripture, when they confessed their Sins, they did it rather for example of Humility, than for necessity, or guilt of Sin. These Heresies have in all Ages been confuted by many Learned and Eminent Divines, and were condemned by many Councils, specially in the Council of *Cartbage*.

An. 182. *Pepusiani*, they were of *Pepusa*, a Town of *Phrygia*, between *Galatia* and *Cappadocia*; They held (beside other Heresies of *Montanus*) that *Pepusa* was the Heavenly *Hierusalem* mentioned by *St. Paul*, *Heb. 12.* and in the *Revelation c. 2. 1.*

Petrus Abelardus, a French man, he held vile things concerning the Blessed Trinity, that the Holy Spirit was the Soul of the World, and that he was not of the Substance of the Father. This was in the twelfth Century.

An. 346. *Photinus* Bishop of *Syrmium* in *Illyria*, a Disciple to *Marcellus*: He held that *Christ's* Kingdom was not everlasting, began at his Birth, and should end at the day of Judgment. He was condemned in the Council of *Sardis*. *Socrat. Eccles. Hist. lib. 2. cap. 19.*

Praxeas, he was Author of the *Monarchici* and *Patripassiani*, he An. 204.
held that God the Father only suffered.

Priscilianistæ, from *Priscilianus*, a man of Noble birth in *Spain*, An. 382.
he confounded the Persons in the Trinity: Held fond Opinions concerning the Creation: That Mans Soul was of the same Essence with God: That Mans life was ruled by the Planets: that Perjury and Lying were lawful, to hide a Mans Religion: He forbid eating of Flesh; and condemned Marriage, but allowed Fornication, and renewed the Heresie of the *Gnosticks*; this was in the days of the Emperor *Gratianus* and *Valentinian*; he was executed at *Travers* as a Sorcerer. *Hist. Magd. Cent. 4. c. 11.*

Proclinianistæ, of one *Proclus*, who (besides other Heresies of the An. 281.
Seleuciani) held that *Christ* was not come in the Flesh.

Quartodecimani, they held that *Easter* was to be observed on the An. 195.
fourteenth Moon; and upon what day soever that Moon happened (though Sunday) they fasted: They refused to admit and receive those who had lapsed after Baptism.

Sabellius an *African*, he and his Followers confessed, that there An. 256.
was but one God only, but they denied that there were three distinct Persons in that one Godhead: They not only confounded, but took away the Persons in the Trinity: He was the Founder of the *Photinean's* Heresie: They were called *Patripassiani*, because their Opinion imported that the Father suffered; this *Sabellius* was for his Heresie excommunicated.

Savosatenus, Bishop of *Antioch*, he denied the Divinity of the Son of God; affirming that *Christ* obtained the Name of the Son of God through his virtuous Behaviour and patient Suffering, but that he was not naturally and truly the Son of God, begotten of the Substance of the Father: He abrogated the *Psalms* sung in the Church, and hired Women there to sing his own Praises: He was deposed by a Council at *Antioch*, and excommunicated by all the Christian Churches in the World. This was (as some affirm) not in the second but third Century.

Saturniani, from one *Saturnine* of *Antioch*, who with *Basilides* An. 130.
the *Ægyptian*, shared the Heresie of *Simon* in two parts; this *Saturnine* held that his Disciples, though living dissolutely, might be saved by Faith in him: That the World and Men were Created by seven Angels *præter voluntatem Dei*: That *Christ's* Body was phantastical:

astical: That there was one God of the *Jews*, another of the *Christians*: That at Beginning a Good and a Bad man were created, and that from the Good came good men, and from the Bad came evil men: That Marriage was a Doctrine of Devils: That men must abstain from things that had life: That some of the Old Prophets were of the Devil: and lastly they denied the Resurrection of the Body.

An. 154.

Secundiani of *Secundus*, who was the Chief Disciple of *Valentinian* the Heretick; and held all his Heresies, and allowed his Followers all filthiness of Life.

Seleuciani or *Hermiani* from *Seleucius* and *Hermias*, they most abominably held, that the Mafs whereof God created the Elements was Coeternal with himself: That the Angels, not God, created the Souls of Men. That *Christ* in his Ascension unclothed himself of the Flesh of Man, and left it in the Globe of the Sun: They received not Baptism by Water: They denied the Resurrection of the Body, supposing that by new Generations, one succeeding another, that is performed which in Scripture is witten concerning the Resurrection.

An. 172.

Setbitæ, another Branch of *Valentinian* in *Egypt*: They held, that Angels begat men in the beginning: They attributed to *Setb* the Honour due to our Saviour, and denied the Resurrection of the Body.

An. 190.

Severus, Successor to *Apelles* in the School of *Marcion*, his Heresies were spread in East *Syria*: They forbad the use of Wine: rejected the Old Testament and the Prophets, using *Apoeryphal* Books of their own: Denied the Resurrection: Ascribed the Creation to Angels; Detested Women as works of the Devil, and used Magick.

An. 41.

Simon Magnus, said to be the Father of Hereticks, he was a Magician and an Hypocrite, though Baptized by *Philip* the Apostle: he spread his Heresies at *Rome*, where he grew so famous, that the people erected an Image to him with an Inscription, *Simoni Deo Sancto*: he most blasphemously affirmed himself to be true God: That the World was Created by Angels: he denied that *Christ* was either come or suffered: he denied also the Resurrection of the Body: he brought in the promiscuous use of Women, and used the company of *Helena*, whom he blasphemously gave out to be the *Holy Ghost*, and that he begat Angels of her:
her

he taught his Disciples to worship Images, his own Image, and the Image of *Helena*, who accompanied him from *Asia* to *Rome*: he attempted to shew his power in flying, and with a fall broke his Thigh, and died miserably. — *Iren. l. 1. c. 30. Aug. Epiph. Theod.*

Swerkfeldius, born in *Silesia*, he held that the outward Ministry of the Word and Sacraments was not necessary to eternal life, because that by the illumination of Gods holy Spirit, without the Ministry of the Word, Men might be saved.

Tatian, he held that *Adam* was damn'd, called Marriage Fornication, prohibited eating of Flesh and drinking of Wine; he held many Gods, denied Christ to be born of *Dauids* Seed, and condemned the Law of *Moses*; He was Author of the *Euchriste*. An. 165.

Theodatus, a *Catapbrygian*, a poor Carrier of *Constantinople*, he held that Christ was but Man, and begotten by Man; besides which Blasphemy he altered the Gospel according to his own fancy. The *Theodatiani* denied the Divinity of Christ, for when *Theodatus* having in time of Persecution denied Jesus Christ, was reproved for the same, he answered, That he denied not God, but Man, signifying thereby, that Christ was only Man, and not God manifested in our Nature. An. 194.

Theopaschitæ, they held that the Divinity of Christ suffered. An. 338. This Heresie lasted long, and was maintained afterward by *Eutyches* and *Dioscorus*.

Triformiani, they held the Divine Nature one and the same in the three Persons together, but imperfect in the several Persons. An. 407.

Trisheitæ, they held that the Nature and Essence of God was threefold, and not one and the same. *Johannes Grammaticus* (called *Philoponus*) was the Founder of this Heresie. An. 606.

Valentinian, an *Egyptian*, he held plurality of Gods, of both Sexes; a multitude of Heavens and Eternities: That Christ assumed nothing from the Virgin, but passed through her as by a Pipe: That he saved Souls only: That the World was made by Evil Angels: He denied the Resurrection: Despised good Works as unprofitable, and lived of things sacrificed to Idols. Against him *Irenæus* wrote five Book. An. 152.

Valesii, of one *Valens* an *Arabian*; They held that none could be saved, but such as made themselves Eunuchs, detested Marriage, but allowed all filthy Acts; yet Gelded themselves. An. 250.

Venusiani, so called of their lascivious behaviour; They were the same Hereticks that were called *Paterniani* from *Paternus* their Founder, and held the same blasphemous and damnable Heresie.

Ab. 406.

Vigilantius, an Apostate Monk, he declined Churches, and condemned Virginity and Spiritual Exercises. St. *Hierome* wrote against him.

(9.) All these Hereticks do commonly pass under the notion of *Christian Hereticks*, whereas in truth they may more properly be termed *Antichristian*; yet they are stiled *Christian Hereticks* in distinction to the *Jewish Hereticks*, of which sort were the *Pharisees*, the *Sadducees*, the *Hesseees*, the *Galileans*, the *Hemerobaptists*, the *Nazareans*, the *Offens*, the *Sampsseans*, the *Massalians*, the *Herodians*, the *Genites*, the *Merisseans*, the *Calicole*, the *Ophitæ* or *Serpentines*, the *Caiani*, the *Sethiani*, the *Heliognosti*, the *Frog-worshippers*, the *Accaronites*, the *Thamuzites*, the *Samaritans*, with many others, out of which, or some of them, came that cursed Brood of Hereticks which poisoned a great part of the World in the succeeding Generations.

The *Pharisees* (from *Phares*, division or separation,) because they would be accounted Separatists from all others (a), attributed all things to Fate; they believed that God disposed all things, but the Stars helped, yet so as Free Will was left in the hand of Man. They held Transmigration of good Souls, or going into other Bodies; They conceived that he which kept most of the Commandments, although he transgress'd in some, was just before God, with innumerable Pharisaical, Proud and Hypocritical conceits and actions.

The *Sadducees* (either from *Sedec*, Justice, because they were severe and rigorous in Judgment (b); or of one *Sadach*, the first Inventer of their Heresie (c); or from both (d):) These *Sadducees* were called *Mimium* or *Minei*, that is, Hereticks. They interpreted the Scriptures after their own sense, and rejected Traditions; they denied a future Reward, and consequently the Resurrection; They denied also the subsistence Spiritual; They cooped up God in Heaven, without all beholding of evil: They denied Spirit altogether; for they held God to be Corporeal (e): The Soul to die with the Body; They denied Angels and Devils; They ascribed Good and evil to Mans Free Will.

The *Hesseees*, *Esseees* or *Essens*, either from a word which signifieth Rest, or Quietness and Silence (f), or *Essai*, quasi *Sanctus* Holy (g). They are placed by *Pliny* on the West of the Dead Sea (h), a People solitary, without Women, without Mony, they make no Weapon of War, nor meddle with Merchandize; they have

(a) Epiph. Origen. Ambros. in Luc. l. 3. Damasc. de Hæres. Suidas.

(b) Epiph. hæz. 14. Lyra. in Act. 5.

(c) Burgenf. Addit. i. in Epist. Jac. 2. 10.

(d) Serarius.

(e) Lyra. in Act. 23.

(f) Scallig. Elench. c. 26.

(g) Philo.

(h) Plin. l. 5. b. 17.

have no Servants, but are all both free and mutually Servants to each other; they live perpetually chaste, counting continence and contentment great Vertues; they Swear not at all, and have all things common; they avoid Pleasures and Riches as Sins; they Marry not, yet do not deny the lawfulness of Marriage, but the honesty of Women; they shun Oyl and Neatness, yet always wear a white Garment; they neither Buy nor Sell, but mutually communicate; they were worshippers of the Sun, for before the Sun riseth they speak of no worldly Matter, but celebrate certain Prayers, as praying him to rise; they hate an Oath no less than Perjury; they keep the Books of their own Opinions, and the Names of the Angels; they give no sentence of Judgment, being fewer than one hundred. (i); they will not so much as purge Nature on the Sabbath, for fear of prophaning it thereby. (k).

(i) Joseph. de Bell. Jud. l. 2. c. 7.

(k) Scaliger.

The *Galileans*, their Doctrine was, that only God was to be accounted their Lord and Prince, and would rather endure any the most exquisite Tortures, than call any Man their Lord; in other things they agreed with the *Pharisees* (l).

The *Emenobaptists*, so called from their being baptized or wash'd every day at all times of the year; they were in their Doctrine of the Resurrection, and in Infidelity like unto the *Sadducees*; in other things they differed not from the *Scribes* and *Pharisees*. (m).

(l) Joseph. de Antiq. l. 18. c. 2. de Bell. Jud. l. 2. c. 7.

(m) Epiph. hær. 17.

The *Nazaræans*, they would not eat any thing which had life, and held it unlawful to eat Flesh; they disallowed the five Books of *Moses*; they placed all righteousness in Carnal Observations, and professing to imitate *Sampson*, they nourished the Hair of their Head, placing all their Vertue therein. (n).

(n) Philastrius de hær.

The *Offenses* were an Issue of the Ancient *Essens*, holding some things of theirs, as concerning the worshipping of Angels, and of the Sun, adding thereto other Heresies of their own. (o).

(o) Epiph. hær. 19.

The *Sampsæans* would not admit either the Apostles or the Prophets; they worshipped Water, esteemed it as a God, believing that life is from thence. (p).

(p) Epiph. hær. 53.

The *Massalians* were a slip of the *Essens*, but after by Marriage with some *Pseudochristians*, of Jewish became *Christian* Hereticks (q).

(q) Scal. ele. c. 28.

The *Herodians* thought *Herod* to be the *Messias*, and entred into Society for Costs and Charges in common, to be bestowed on Sacrifices and other Solemnities, wherewith they honoured *Herod* alive and dead. (r).

(r) Scal. ad Euseb. p. 150.

The *Genites* or *Genists* stood upon their Stock and Kindred, because in the *Babylonish* Captivity, or after, they married not strange Wives, and therefore boast themselves of the purity of *Abraham's* Seed. (s).

(s) Bridenb.

The *Meriſſeans* or *Meriſts* were (as the name imports) ſprinklers of their Holy-water; they made a diviſion of the Scriptures, and received only ſome part thereof (t).

(t) Idem Brel-deub.

The *Calicolæ* were alſo an Off-ſpring of the *Eſſees*, and from thoſe proceeded the *Maſſallians*; they were Jews, though they corruptly embraced Chriſtianity, and being baptized, revolted to their former Judaifm, and retained the Rites of theſe *Calicola* or Heaven-worſhippers; they had their places of Prayer abroad in the open Air

(u) Scal. Elenc. trib. Serar. c. 31

The *Ophitæ* or *Serpentineſ* worſhipped a Serpent, ſaying, that he firſt procured us the knowledge of Good and Evil, for which God curſed him, and caſt him from the firſt Heaven into the ſecond, whence they expect his coming, eſteeming him ſome virtue of God, and to be worſhipped (w).

(w) Philaſtr. l. de Hereſ.

The *Caiani*, which commend *Cain* for Fratricide, ſaying, that *Cain* was made of the power of the Devil, *Abel* of another power, but the greateſt power was in *Cain* to ſlay *Abel* (x).

(x) Philaſtr.

The *Setbiani* were worſhippers of *Set* the Son of *Adam*, who affirmed, that two Men being created in the beginning, and the Angels diſſenting, the Feminine power prevailed in Heaven (for with them they held, are Males and Females, Gods and Goddeſſes) *Eve* perceiving that, brought forth *Set*, and placed in him a Spirit of great power, that the Adverſaries power might be deſtroyed. Of *Set* they held, that Chriſt ſhould come of his Stock; yea, ſome of them conceived him to be the very Chriſt (y).

(y) Id. Philaſtr.

The *Heliognoſti* were ſuch as worſhipped the Sun, and held that the Sun knew all things of God, and yielded all neceſſaries to Men.

The *Frog-worſhippers* were ſuch as held, that worſhip was due to thoſe crawling Creatures, thereby thinking to appeaſe Divine wrath, which in *Pharaoh's* time brought Frogs upon the Land of Egypt.

The *Ascaronites* were ſuch as held, that worſhip was to be performed unto a Fly, and did worſhip it accordingly; probably for the ſame blind reaſon that others of them worſhipped Frogs; for Divine wrath was executed by the one as well by the other.

The *Thamuzites*, of *Thamuz*, the Son of a Heathen King; they held that his Image was to be worſhipped and adored accordingly the Jewiſh Women that were bewitched with this Hereſie worſhipped this Image of *Thamuz* with Fears and continual Sacrifices; and held further, that *Pharaoh* which ruled in Egypt, in *Moſes's* time, was of that name.

The *Samaritans* were thoſe Jewiſh Hereticks, who held (eſpecially the *Gubbeans* among them) an abſtinence from pollution by the Dead, or Bones, the Slain, and the Sepulchers; they held waſhing their

their Bodies and changing their Vestments, when they enter into the Synagogue; they held such Heretical Opinions, that the other Jews would have no dealings with them; they held that only the five Books of *Moses* were Canonical Scripture, the rest they received not; they held, that neither the Trinity, nor the Resurrection was to be acknowledged; they wash'd themselves with Urine, when they came from any Stranger, being thereby (as they held) polluted; they held themselves profan'd by the touch of one of another Faith; and therefore if they touch'd one of another Nation, they div'd themselves, Garments and all in Water; they held a dead Corps in abomination presently (z). If they met a Jew or Christian, they said *Touch me not* (a). They call themselves, *Men which belong to the Blessed Hill*. They abstained from things that have Life, and some of them from Marriage. One *Dositheus* a Samaritan is supposed to be the first Founder of the Samaritan Heresies, and the first among them that rejected the Prophets, as not having spoken by the Holy Ghost (b). There were four Sects of Samaritan Hereticks, according to *Epiphanius*, each of them holding their different Heresies in some respects, and having in other respects certain Heretical Tenets common to them all. By all which Premisses it is most evident, that the Prince of *Darkness* and the Father of *Lies*, hath had in all Ages, Nations and Churches, his Emissaries to infect them with Heretical and Blasphemous Errors; but the Gates or Power of Hell to this day never could, nor so Eternity ever shall prevail against the Truth.

(z) Epiph.
hær. 9.

(a) Druf. de
3. Sect. 1. 2.

(b) Tert. pra-
scrip. adverf.
Hær. l. 1.

CHAP. XLI.

Of Councils, Synods, and Convocations.

1. *The several kinds of Councils and Synods.*
2. *What Canons in force in the Realm of Primo Ed. 6. Also how the Canons entituled Reformatio Legum Ecclesiasticarum became abortive.*
3. *That part of the Canon Law, is part of the Law of England.*
4. *Convocation in England, what, how, and by what Authority, and for what ends conven'd; also of what Members it doth consist; with the Authority thereof.*
5. *Convocations and Provincial Synods of very great Antiquity in England; have been ever call'd by the Kings Writ; their Priviledges.*
6. *The Canons and Ecclesiastical Constitutions may not be repugnant either to the Kings Prerogative, or to the Laws, Statutes, or Customs of this Realm.*
7. *Lindwood's Method of Provincial Synods in this Realm, and under what Archbishops.*
8. *The four several kinds of Councils and Synods in general.*
9. *A compendious Catalogue thereof, when and where held, by and under whom conven'd, with the principal matters therein treated and determined.*

(1.) **O**F Councils or Synods there are four kinds, viz. 1. *Oecumenical*, as being called out of divers Nations. 2. *National*, as out of divers Provinces; both these kinds of Councils or Synods were ever assembled by Imperial, Regal, or Papal Authority. 3. *Provincial*, as out of divers Dioceses, conven'd by Metropolitans or Patriarchs. 4. *Diocesan*, as out of one Diocess only, assembled by the Bishop thereof. The frequent celebration of Synods the Council of Basil calls *præcipuam agri Domini culturam*. Touching Synods *vid. Duar. de sacr. Eccl. ministr. & benefic.*

(2.) In the Reign of King Hen. 8. the Bishops and Clergy in the Convocation An. 1532 oblig'd themselves neither to make nor execute any Canons or Constitutions Ecclesiastical, but as they were thereto enabled by the Kings Authority; it was by them desired, by him assented unto, and confirm'd in Parliament, that all such Canons and Constitutions, Synodal and Provincial, as were before

before in use, and neither repugnant to the Word of God, the Kings prerogative Royal, or the known Laws of the Land, should remain in force until a Review thereof were made by thirty Persons of the Kings appointment; which Review not having been made from that time to the first year of King Edward 6. All the said old Canons and Constitutions so restrained and qualified, did then still remain in force, as before they were. For this consult the Act of Parliament of 25 H. 8. c. 1. And in the third year of the said King Edw. 6. there passed an Act in Parliament, *For enabling the King to nominate eight Bishops, and as many Temporal Lords, and sixteen Members of the Lower House of Parliament, for reviewing of such Canons and Constitutions, as remained in force by virtue of the Stat. made in the 25th year of King H. 8. and fitting them for the use of the Church in all times succeeding.* According to which Act the King directed a Commission to Archbishop Cranmer, and the rest of the Persons whom he thought fit to nominate to that employment; and afterwards appointed a Sub-Committee of eight Persons to prepare the work and make it ready for the rest, that it might be dispatch'd with the more expedition: Which said eight Persons were the Archbishop of Canterbury, Dr. Goodrich Bishop of Ely, Dr. Cox the Kings Almoner, Peter Martyr Dr. in Divinity, William May & Rowland Taylor Doctors of Laws, John Lucas & Richard Goodrich Esquires; by whom the Work was undertaken and digested, fashioned according to the method of the Roman Decretals, and called by the name of *Reformatio Legum Ecclesiasticarum, &c.* But not being Commissionated hereunto till the 11 of November in the year 1551 they either wanted time to Communicate to the chief Commissioners, by whom it was to be presented to the King, or found the King encumber'd with more weighty Affairs, than to attend the perusal thereof. And so the King dying before he had given life unto it by his Royal assent and signature, the design miscarried; and never since thought fit to be returned in the following Times by any of those who had the Government of the Church, or were concerned in the honour and safety thereof.

Dr. Hyl. Hist.
Eccl. de Temp.
Ed. 6. p. 19. &
83.

(3.) It is asserted by good Authority, That if the Canon Law be made part of the Law of this Realm, then it is as much the Law of the Land, and as well, and by the same Authority, as any other part of the Law of the Land. Likewise in the Case of *Shute* against *Higden*, touching Voidance of a former Benefice by being admitted and instituted into a second, and that by the Ancient Canon Law received in this Kingdom. *This* (says the same Authority) *is the Law of the Kingdom in such cases.* And in the Case of *Hill* against *Good* the same Author doth further assert, *That a Lawful Canon is the Law of the Kingdom, as well as an Act of*

Case Eds vers.
the B. of Ox. in
Sir J. Vaughan's Rep. &
Arg.

* Lawful: it
must also be sup-
posed to be re-
ceived into use
and practice.

Parlia-

(a) Sir John
Vaughan's
Rep. & Arg.

(b) Co. Inst.
p. 3 cap. 36.

(c) F.N.B.
269. b.
Co. Inst. 1.
Sect. 133.
21 H.8.1.
32 H.8.23.
33 H.8.31.
Co. Inst. p. 4.
c. 74.

(d) 21 R.2.
c. 2 & 12.
Cow. Interp.
vct. Proctors.

Parliament: And whatever is the Law of the Kingdom, is as much the Law as any thing else is so; for what is Law doth not supersede magis et minus (a). Which Premises, though they may seem, yet are not inconsistent with what Sir Edward Coke says, viz. That the Laws of England are not derived from any Foreign Law, either Canon, Civil, or other, but a special Law appropriated to this Kingdom (b): That it may be said of its Law as of its situation, *Ex penitus toto divisos Orbe Britannos*.

(4.) Convocation is the highest Ecclesiastical Court or Assembly, called and convened in time of Parliament by the Kings Writ, directed to the Archbishops, consisting of all the Clergy of both Provinces, either Personally or Representatively present, in the Upper House of the Archbishops and Bishops, and the Lower House of the other Clergy or their Proctors, chosen and appointed to appear for Cathedral or other Collegiate Churches, and for the Common Clergy of every Diocess, with a Prolocutor of each House, and President of the Convocation for the Province of Canterbury, to consult of matters Ecclesiastical, and thereon to treat, agree, consent and conclude (as occasion requires) on certain Constitutions and Canons Ecclesiastical, to be ratified and confirmed by the Royal assent (c). They were anciently called *Churchgemore*. *Int. Leges. H. 1. c. 8.* The Convocation is under the power and Authority of the King, 21 Ed. 4. 45. b. Assembled only by the Kings Writ, 13 Ed. 3. *Rot. Parl. M. 1. vid. Stat. 25 H. 8. c. 19.* The King having directed his Writ (therein assigning the time and place) to each of the Archbishops to the effect aforesaid, the Archbishop of Canterbury doth thereupon direct his Letters to the Bishop of London, as his Dean, *Lindw. Provin. sect. 1. de Parnis ver. Tanquam in Gloss.* First citing himself peremptorily; then willing him to cite in like manner all the Bishops, Deans, Archdeacons, Cathedral and Collegiate Churches, and generally all the Clergy of his Province to the place at the day in the said Writ prefixed; withal directing, that one Proctor for every Cathedral or Collegiate Church, and two for the other Clergy of each Diocess may suffice. In pursuance whereof the Bishop of London directs his Letters accordingly, willing them to certify the Archbishop the Names of all such as shall be so monished by them, in a Schedule annexed to their Letters Certificatory; whereupon the Cathedral and Collegiate Churches, and the other Churches having elected their Proctors, it is certified to the Bishop, who makes due Returns thereof; which method is likewise observed in the other Province of York. It is said, That these Proctors anciently had place and Vote in the Lower House of Parliament (d); a good expedient for the maintenance and Preservation of the Liberties of the Church. The Prolocutor

locutor of the Lower House of Convocation, is immediately at the first Assembly by the motion of the Bishops, chosen by that Lower House; and presented to the Bishops as their Prolocutor, by whom they intended to deliver their resolutions to the Higher House, and to have their own House specially ordered and governed: His Office is to cause the Clerk to call the Names of the Members of that House as oft as he shall see cause; likewise to see all things propounded to be read by him, to gather the Suffrages or Votes, and the like. *Trin. 8 Jac.* It was resolved by the two chief Justices, and divers other Justices at a Committee before the Lords of Parliament, concerning the Authority of a Convocation, (1.) That a Convocation cannot Assemble without the Assent of the King. (2.) That after their Assembling, they cannot confer to constitute any Canons without Licence *del Roy*. (3.) When upon Conference they conclude any Canons, yet they cannot execute any of them without the Royal Assent. (4.) They cannot execute any after Royal Assent, but with these Limitations, *viz.* (1.) That they be not against the Kings Prerogative: (2) Nor against Statute Law: (3) Nor against the Common Law: (4) Nor against the Customs of the Realm. All which appears by 25 H.8.c.19. 19 E.3. Title *Quare non Admissi*, 7. 10 H.7.17. *Merton*, cap.9. — By 2 H.6.13. a Convocation may make Constitutions to bind the Spirituality, because they all in person, or by representation are present, but not the Temporality. *Q. And 21 Ed. 4. 47.* the Convocation is Spiritual, and so are all their Constitutions. *Vid. The Records in Turri*, 18 H.8. 8 Ed. 1. 25 E.1. 11 Ed. 2. 15 Ed.2. *Prohibitio Regis ne Clerici in Congregatione sua, &c. attinet contra jus seu Coronam, &c.* By which it appears, that they can do nothing against the Law of the Land, or the Kings Prerogative.

(5.) The word [Convocation] and the word [Synod] are rather words of two Languages, than things of two significations; for although they have different derivations, the former from the *Latine*, the other from the *Greek*, yet in effect they both center in the same thing. Convocation a *Convocando*, because they are called together by the Kings Writ. It is of very great Antiquity according to Sir Edward Coke, who mentions out of Mr. Bede and other Authors and ancient Records, such as were nigh a thousand years since, and more expressly of one great Synod held by *Austins* Assembling the *Britan* Bishops in Council, *An. 686.* (d). And affirms, That the Clergy was never assembled or called together at a Convocation, but by the Kings Writ (e). And in the year 727. there was a Convocation of the Clergy called

Q. Trin. 8 Jac.
Convocation
Case.

Coke lib. 12.
Co. Inst. p.4.
cap. 74.
(d) *Newburgh*
L. c. 13. Bract.
l. 3. f. 123, 124.
6 H. 2. Hol.
203. Rot. Par.
18 Ed. 3. nu. 1.
& Rot. Par.

2 H.4. nu. 29. F.N.B. 269. 8 H.6.c.1. Co. Inst. pag. 3. cap. 74. (r) 18 Ed. 3. nu. 1. 13 Ed. 3. Rot. Par. 16. 24 Dors. Clau. 18 Ed. 3. nu. 30. 31. 25 H.8.1.

- (f) *Int. Leges*
Ine An. 727.
Co. ubi supr. *Magna Servorum Dei frequentia (f).* It was by the assistance and authority of *Erhelbert*, the first Christian King of *Kent*, that *Austin* called the aforesaid Assembly of the *British* Bishops, and Doctors, that had retained the Doctrine of the Gospel, to be held in the Borders of the *Vikians* and *West-Saxons*, about *Southampton*, as supposed, to which resorted (as *Mr. Bede* says) Seven Bishops, and many other Learned Divines; but this Synod or Convocation suddenly brake up without any thing done or resolved (g). This Assembly was conven'd for determining the time for the Celebration of *Easter*; touching which the Controversie continuing no less than 90 years after, was at last concluded at another Convocation purposely called at *Whitby* by the Authority of *Oswy* King of *Northumberland*, and whereof the Reverend *Cedda*, newly consecrated Bishop, was *Prolocutor*, and King *Oswy* himself present at the Assembly (b). Likewise about the year 1172. at *Cassils* in *Ireland* a Convocation was held by Authority of King *H. 2.* soon after he had conquered that Island, which Convocation was for the Reformation of the *Irish* Church, where amongst many other Constitutions it was Decreed, *That all the Church Lands, and all other Possessions, should be altogether free from the Exaction of Secular men, and that from thenceforth all Divine things should be handled in every part of Ireland in such sort, as the Church of England handleth them (i).* Likewise about the year 1175. at *London* a Synod or Convocation was held, at which King *H. 2.* was present, where among other Canons and Constitutions, it was both by Authority of the King and Synod decreed, *That every Patron taking a Reward for any Presentation, should for ever lose the Patronage thereof (k).* Which together with other Canons then made for the better Government of the Church of *England*, were published by *Richard* Archbishop of *Canterbury*, with the Kings Assent (l). Likewise a Provincial Synod was held at *Oxford* by *Stephen Langton* Archbishop of *Canterbury* under King *H. 3.* about the year 1222. for Reformation of the Clergy (m), with many others, in subordination to the Laws of the Land. One special Privilege of the Convocation appears by 8 H. 6. cap. 1. *All the Clergy from thenceforth to be called to the Convocation by the Kings Writ, and their Servants and Familiars shall for ever hereafter fully use and enjoy such Liberty and Immunity in coming, tarrying, and returning, as the Great men and Commonalty of the Realm of England, called or to be called to the Kings Parliament, have used or ought to have or enjoy.* 8 H. 6. In Parlamento Statutum est, ut Prælati atque Clerici, eorumque Famulatus cum ad Synodos accesserint, eisdem Privilegiis ac Immunitatibus gaudeant, quibus Milites & Burgenses Parliamenti. Ant. Brit. fo. 284. nu. 30.

(6.) The

(6.) The Jurisdiction of the Convocation in this Realm, though relating to matters merely Spiritual and Ecclesiastical, yet is subordinate to the established Laws of the Land; it being provided by the Statute of 25 H. 8. c. 19. *That no Canons, Constitutions, or Ordinances shall be made or put in execution within this Realm by Authority of the Convocation of the Clergy; repugnant to the Prerogative Royal, or to the Customs, Laws, or Statutes of this Realm.* To the same effect was that of 9 Ed. 1. Rot. Parl. Mem. 6. *Inhibitis Archiepiscopo, & omnibus Episcopis, & aliis Prælatibus apud Lambeth Conventuris, ne aliquid statuant in præjudicium Regis Coronam, vel dignitatem.* For although the Archbishop and the Bishops, and the rest of the Clergy of his Province, assembled in a Synod, have power to make Constitutions in Spiritual things, yet they ought to be Assented by Authority of the King, and to have (as aforesaid) his Royal Assent to their Constitutions; which being had and obtained, the Canons of the Church, made by the Convocation and the King, without Parliament, shall bind in all matters Ecclesiastical, as well as an Act of Parliament, as was Resolved in *Bird and Smiths Case* (n). Although the Saxons, who founded and endowed most of our Churches, and made many good Laws in reference to the Jurisdiction, Power, and Privileges thereof; yet the Royal Prerogative, with the Laws and Customs of the Realm, were ever so preserved, as not to be invaded thereby; King *Æthelbert* the first Saxon King, King *Ina*, *Æthelstane*, *Edmund*, *Edgar*, and King *Kanute*; all these made Laws in favour of the Church, but none of them ever entrenched on the Prerogative of the Crown, or on the Laws, or Customs of the Realm; nor were any of those ancient Church-Laws ever made without the supreme Authority to ratify and confirm the same.

(7.) The Laws and Constitutions whereby the Ecclesiastical Government is supported, and the Church of *England* governed, are the General Canons made by General Councils, also the *Arbitria Sanctorum Patrum*, the Decrees of several Archbishops and Bishops, the ancient Constitutions made in our several Provincial Synods, either by the Legates *Orbo* and *Orbobo*, or by several Archbishops of *Canterbury*. All which by the 25 H. 8. are in force in *England*, so far as they are not repugnant to the Kings Prerogative, the Laws and Customs of *England*. Also the Canons made in Convocations of Later times, as *Primo Jacobi Regis*, and confirmed by his Regal Authority: Also in some Statutes Enacted by Parliament touching Ecclesiastical Affairs, together with divers Customs not written, but in use beyond the memory of Man; and where these fail, the Civil Law takes place. Among the *Britain Councils* (according to Bishop *Prideaux* his *Synopsis* of

20 H. 6. 13.
Newton.

St. 25 H. 8. c. 19.

(n) *Bird* vers.
Smith.
Mores Rep.

Councils, *Edw. 5.*) these amongst the rest are of most remark, viz. At *Winchester*, in King *Edgar's* time under *Dunstan*: at *Oxford* by *Stephen Langton* Archbishop of *Canterbury*; at *Clarendon* under King *Henry the Second*. The Council under King *Edward the Sixth*, in which the nine and thirty Articles of the *English Confession* were concluded and confirmed. The Synod under the same King, from which we receive the *English Liturgy* which now we have, composed by Seven Bishops and Four Doctors, and confirmed by the publick consent of the Church, which (as also the said nine and thirty Articles) the succeeding Princes, Queen *Elizabeth*, King *James*, and King *Charles*, ratified and commended to Posterity. At *London* a Synod, in which 141 Canons or Constitutions, relating to the pious and peaceable Government of the Church, presented to King *James* by the Synod, and confirmed by his Regal Authority; and at *Pertb* in *Scotland*, where were Articles concerning Administ'ring the Sacrament to the Sick, Private Baptism where Necessity requires, Confirmation, admitting Festivals, kneeling at the Receiving the Sacrament, and an allowance of Venerable Customs. But *de Concil. Britan.* vid. *D. Spalman.* The Ancient Canons of the Church and Provincial Constitutions of this Realm of *England*, were according to *Lindwood* the Canonist (who, being Dean of the *Arches*, compiled and explained the same in the time of King *H. 6.*) made in this order or method, and under these Archbishops of *Canterbury*, viz. The Canons or Constitutions.

1. Of *Stephen Langton*, Cardinal, Archbishop of *Canterbury*, in the Council at *Oxford*, in the year of our Lord 1222, who distinguish'd the Bible into Chapters.

2. Of *Osbo*, Cardinal, the Popes Legate in *An.* 1236, on whose Constitutions *John de Aiton*, Dr. of Laws, and one of the Canons of *Lincoln*, did comment or gloss.

3. Of *Boniface* Archbishop of *Canterbury*, 1260.

4. Of *Osborn*, Cardinal of Saint *Adrian*, and Legate of the Apostolical Chair; On whose Constitutions the said *John de Aiton* did likewise Glossematize. His Canons were made at *London* in *Anno* 1268.

5. Of *John Peckham*, Archbishop of *Canterbury*; at a Synod held at *Reading*, *Anno* 1279.

6. Of the same *Peckham*; at a Synod held at *Lambeth*, *Anno* 1281.

7. Of *Robert Winchelsey*; Archbishop of *Canterbury*, *Anno* 1305.

8. Of

8. Of *Walter Reynold*, Archbishop of *Canterbury*, at a Synod held at *Oxford*, *An. 1322*. These Constitutions in some Books are ascribed to *Simon Mepham*, but erroneously; for the date of these Constitutions being *An. 1322*, the said *Walter Reynold* (according to the *Chronicle*) died in *An. 1327*, and was succeeded by *Simon Mepham*.

9. Of *Simon Mepham* Archbishop of *Canterbury*, *An. 1328*.

10. Of *John Stradford*, Archbishop, *An. 13...*

11. Of *Simon Iſtpe*, Archbishop, *An. 1362*.

12. Of *Simon Sudbury*, Archbishop, *An. 1378*.

13. Of *Tho. Arundel*, Archbishop, at a Synod or Council held at *Oxford*, *An. 1408*.

14. Of *Henry Chichey*, Archbishop, *An. 1415*.

15. Of *Edmund*, Archbishop of *Canterbury*.

16. Of *Richard*, Archbishop of *Canterbury*.

Sudbury, Lord Chancellor, he was betrayed by the Rebels of *Wat. Tyler*. *Arundel*, Lord Chanc. *Chichey*, Cardinal.

The Dates of the Canons or Constitutions of these two last *Lindwood* makes no mention, by reason of the uncertainty thereof: but withal says, it is clear, That *Richard* did immediately succeed the foresaid *Stephen Langton*; and the said *Edmond* succeeded *Richard*. *Lindw. de Pau. c. ad huc. & infra, in verb. Minime admittatur*. If so, then it was most probably *Richard Welleshead*, who was Archbishop of *Canterbury*, *An. 1229*. And *St. Edmond* Chancellor of *Oxford*, who was Archbishop of *Canterbury*, *An. 1234*. (r).

(8.) Councils were either General, or Oecumenical from whence whereunto Commissioners by the Emperors Authority were sent from all quarters of the World, where Christ hath been preached; Or National: or Provincial: or Particular, by Bullenger called *congregatio*; such were the Councils of *Gangra*, *Neo-Cesarea*, and many others, commonly Assembled by Patriarchs and Bishops in some particular place of a Country. The ends of these Councils chiefly were, either for the suppression of Heresies, the decision of Controversies, the appeasing of Schisms, or the Ordaining of Canons and Constitutions for decency of Order in the Church. *Ad. Africi Canones ad Wulstinnu Episcopum: Can. 33.* where it is said, That there were four Synods for the defence of the True Faith against those Hereticks, who belched out their Blasphemies against the Holy Trinity, and the Humane nature of our Saviour; the First whereof was at *Nice*; another after that at *Constantinople*, consisting of an hundred and fifty Bishops; the Third at *Ephefus*, of two hundred Bishops; the Fourth at *Chalcedon*, where

(r) *Hol. Hist. verb. Canterbury.*

National, such as were Provincial, every Metropolitane, within their own Limits.

where many hundreds of Bishops were present; and they all with an unanimous Consent confirmed all those Decrees which were made in the *Nicene Council*. These four Synods (says the said Canon) are so to be observed by the Church of Christ, as *Quatuor Christi Godes*. There were many other Synods about the same time, but these four were of the best Authority.

At Jerusalem.
Cent. 1.

At Jerusalem in the First Century the Apostles, Elders, and Brethren held a Council against some Pharisees, touching Circumcision, in the Fourth year of the Reign of the Emperor Claudius. The Apostles celebrated also certain Councils for the substituting of *Matthias* in the place of *Judas*; *Act. 1*. For the Election of Seven Deacons -- *Act. 6*. For not pressing the Ceremonial Law; *Act. 15*. For the toleration of some legal Observations only for a time, *Act. 21. 18*. To these some will have to be added a Meeting by the Apostles, wherein was composed the Apostles Creed. Also another Assembly of the Apostles, which did obtrude to the Church 85 Canons under the notion of the Apostles Authority, concerning which there are various Controversies. In this Century there were also two Synods summoned in Asia, for the Reformation of the Churches, and Consecration of Bishops, at which *John the Evangelist* was present. *Euseb. lib. 3. cap. 20*.

At Ancyra,
Cent. 2.

At Ancyra in Galatia in the second Century was Assembled a Synod of divers Bishops, wherein the Fignents of *Montanus* were confuted. In this Synod *Montanus* was excommunicated, and his Heretic condemned. *Euseb. lib. 5. cap. 14*. In this Century, viz. An. 195. Six several Synods were held about the Observation of Easter, viz. At Rome in *Victors* time; at *Casarea* in *Palestina*; at *Pontus* in France, where *Irenaeus* was chief; in *Ostrea* and at *Ephesus*. In all which Synods it is observed, That the Bishop of Rome had no more Authority than the other Bishops. *Euseb. lib. 5. cap. 23*.

Euseb. lib. 6. cap. 30
At Beryta,
Cent. 3.

In the Third Century there were eight or nine Synods of remark, viz. At Beryta, where *Beryllus* was confuted by *Origen*: at Rome in the time of *Eabianus*, where the Schism of *Novatus* was removed; another at Rome in the time of *Cornelius*, wherein *Novatus* the Heretick was condemned; at Antioch, where *Novatus* was condemned again; at Carthage, which erred about the Re-baptizing of Hereticks; at Iconium, for receiving of Hereticks after Repentance: at Antioch again, where *Samoletenus* was condemned; this was about the Twelfth year of *Galienus*: Another at the same place under *Aurelianus*, where he was condemned again, and deprived of his Church. And at Sinuessa, consisting of 300 Bishops, where *Marcellinus* Bishop of Rome was condemned for denying Christ, and sacrificing to Idols. *Tom. 1. Concil.*

Ibid. cap. 26
28, 29.

At

At *Ancyra* in the Fourth Century, about the year 308. were assembled Bishops of divers Provinces, to constitute a form of Ecclesiastical Discipline, according to which they who had Sacrificed to Idols in time of Persecution, were to be received again upon their Repentance. In this Council also it was ordained; That *Coe-piscopi*, that is, Country-Bishops, or *Vicarij Episcoporum*, should abstain from Ordination of Elders and Deacons, and from usurping of Dominion over the Preaching Elders, who were in Cities. This Council was subscribed by Eighteen Bishops.

At *Ancyra*,
Cen. 4. An. 308.

At *Nicea* in *Bythinia*, Assembled by the Authority of *Constantine* the Great, a General Council, consisting of 318 Bishops: The exact time when it began Historians do not agree, some conceive it was A.D. 325. So *Hilar. Socors. l. 2. c. 29.* Others 359. So *Baron. N. 27.* Others 330. and others refer the year to 333. But *Eusebius* computeth it to be in the twentieth year of *Constantine's* Reign. It was also in the time of *Julius* the First, and *Silvester*, Popes. Three things especially are reported to be condemned by this famous Council. 1. The *Arian* Heresie, Blasphemously denying the Son to be Co-eternal and Co-essential with the Father. 2. The dissent of the Eastern from the Western Christians about the Celebration of the Passover, in a manner different from the Jewish Custom; and it was concluded in this Council, That the Feast of *Easter* should be kept on the Lords Day, and not on the Fourteenth day of the First Month of the Jews, called *Nisan*. 3. The Schismatical dissensions of the *Melitanians* and *Novatians*. In this Council the Emperor burnt all the Accusations which the Bishops brought against each other; as unworthy to be seen. Of this Council it is anciently Recorded, That *Constantinus Imperator congregavit in Nicæa Civitate 318 Episcopos ex omnibus Nationibus ad Confirmandam fidem Catholicam. Ita in Tertio Can. Elfrici ad Wulfm. Episcop.*

The first, at
Nicea, An. 330.
or 333.

*Euseb. de vita
Constant. lib. 3.*

Ruffin. l. 1. c. 6.

At *Tyrrus* in the Fourth Century was convened a National Council by *Constantine* the Emperor, in the Thirtieth year of his Reign; wherein were 60 Bishops from *Egypt*, *Lybia*, *Asia* and *Europe*; the major part thereof were *Arians*, who charging *Athanasius* with false accusations, deposed him in his absence; whose Deposition *Arsenius* subscribed with the same hand, which the *Arians* alledged. *Socras* was cut off by *Athanasius*.

At *Tyrrus*,
Cent. 4.

At *Gangra* in *Paphlagonia* about the year 324. were assembled about sixteen Fathers; In which Council were damned the heretical Opinions of *Eustatius*; who admiring the Monastick life, or favouring the Heretic of *Encratia* and the *Manicheans*, spake against Marriage and eating of Flesh, and damned the publick Congregations for the service of God in Temples, saying, a man could not be saved unless he forsook all his possessions.

At *Gangra*,
An. 324.

About

At *Antioch*. About this time there was a Council at *Antiochia*, wherein the *Arians* deposed *Eusebius*. As also a Council at *Arles*, wherein *Cecilianus* was absolved from the Accusation of the *Donatists*.

At *Elisberg*. At *Elisberg* in *Spain* in the time of *Constantine* Reign, were assembled 19 Bishops and 36 Presbyters. Among the 82 Canons made in this Synod, it was Ordained in the 36 Canon, That nothing that is worshipped should be pictured on a Wall, and that in Private Houses no Idols should be found.

At *Carthage*. At *Carthage*, the First Council there (wherein St. *Cyprian*, with the Advice of many other Bishops of *Nomidia*, *Lybia*, and other parts of *Africa*, Ordained those who were baptized by Hereticks, to be rebaptized) was not held under the Reign of *Constantine*, for that St. *Cyprian* was Martyred in *Valerian* days, the Eighth persecuting Emperor; but the first Council at *Carthage* held in *Constantine* days, was that wherein the *Donatists* condemned *Cecilianus* Bishop of *Carthage*, whose innocency was made afterwards to appear.

At *Antioch*. At *Antioch*, the First Council there was held by *Arians* under the Reign of *Constantine*, Son of *Constantine*, in the year 340 or 344. This being one of the Councils, which either determine Heretical Opinions, or raise up Schisms and Troubles to the dispersing of the Christian Flock, doth not undeservedly pass under the name or notion of one of the Rejected Councils. To this Assembly resorted 90 Bishops, under pretence of Dedicated the Church of *Antioch*, built by *Constantine*, when in truth their principal design was to eject *Athanasius* out of his Chair, and to subvert that System of Faith, which was set down in the *Nicene* Council. This Council of *Antioch* is to be distinguished from five others which *Bellarmino* reckons; *Longus* doth also name this, and mentions other Councils of *Antioch*. But this Council is referred to the time of *Constantine*, and *Julius* the First. *Athanasius* being restored from Banishment by *Constantine*, the Son of *Constantine* the Great, the *Arians* declare it to be unlawful, because the same Authority which did eject, must restore; This matter therefore being referred to Pope *Julius*, he summons the Synod to appear at *Rome*. But the *Eusebians*, chief of the Hereticks, that they might avoid this, did without much difficulty seduce *Constantine* to be at the Consecration of the Magnificent Temple built by *Constantine* the Great at *Antioch*; where were met about 90 Bishops, as aforesaid, 30 whereof being *Arians*, the Favour and Authority of the Emperor, against the double Suffrages of the Orthodox procured the condemning of Restored *Athanasius*. It is said of this Council, That they did set forth a Form of Belief so intermixed with Truth and Error, that he which is heedful lest he

be deceived, in his greatest wariness can scarcely be safe, for by the omission of what might establish the Truth, they weaken that which they undertake to maintain. To this Council probably may be refer'd Two other Councils, which some report to have been held also at *Antioch* about the year, 348. the former whereof was occasioned by the favour, which *Julius* Bishop of *Rome* shewed to *Athanasius* Bishop of *Alexandria*, and other Bishops. In the other the *Arians* did set forth a new Sum of their Faith, which being sent to the Bishops of *Italy*, was refused by them, adhering to that of the *Nicene* Council.

Socrat. l. 2. c. 9.
Sozom. l. 3. c. 5.
At *Antioch*,
An. 348.

At *Sardis* in *Illyricum* in the year, 351. by the Command of *Constantius* and his Brother *Constant* a great National Council was assembled, consisting of 376 Bishops, whereof Three hundred were from the West, and Seventy six from the East, from Thirty five Provinces in all. The three hundred Western Bishops confirmed the *Nicene* Creed, to this end, That *Athanasius*, who was banished *Rome* for the space of three years, should be restored to his Place at *Alexandria*; but the other Seventy six *Arians* meeting at *Philippolis* confirmed *Arianism* under the Title of the Council of *Sardis*. In this Council by reason of the *Arian* Faction, and from thence forward, were added different Affections to different Opinions. In this Council, which is commonly called an Appendix to the First *Nicene* Council, were ratified 21 Canons under Pope *Julius*.

At *Sardis*,
An. 351.

At *Sirmium* in *Illyria*, in the year, 356. by Command of the Emperor *Constantius* a Council was held, where were present, besides Eastern, Three hundred Western Bishops and upwards, for the hearing and deciding the Cause of *Photius*, who complained to the Emperor, that he was unjustly condemned at the Synod of *Sardis*, although he had preached that Christ was meer Man, and inferior to his Mother. This Council at *Sirmium* so groaned under the *Arian* Tyranny of *Constantius*, that the Supremacy and Presidentship of Pope *Liberius* dared not to appear; *Photius* Bishop of *Sirmium* having renewed the Heresies of *Sabellius* and *Samosatenus*: Of this Council (saith *Longus*) there is nothing extant besides Three Forms of Belief, which are found in *Basilus*. In this Synod there was a hot Dispute between *Basilus* Bishop of *Ancyra*, an *Arian* Heretick, and the said *Photius* a *Sabellian* Heretick.

Vld. Bish. Pri-
deaux Synopf.
of Councils.

At *Sirmium*,
An. 356.

Dist. Synopf.

Vld. Socrat.
l. 1. c. 24.
Sozom. l. 4.
c. 5. & 6.
Epiph. Hær. 7.

At *Millain*, in the year, 355. at the instance of the *Arians* a Council consisting of 300 of the Occidental Bishops at the Command of *Constantius* was assembled, who (after that the Emperor *Constant* was slain by *Magnentius*) had the whole Sovereignty both of the East and West in his hands. This Council was convened

At *Millain*,
An. 355.

Socrat. l. 2.
c. 35.

Theod. 1. 2.
c. 15.

partly for ratification of the Sentence pronounced against *Athanasius* at *Tyru*; and partly for subversion of the *Nicene* Faith, but prevailed in neither. In this Council the Emperor himself was President, *Liberius* being Pope; I (saith the Emperor) in this Council am an Accuser of *Athanasius*. The Western Catholick Bishops there present (for there were few Eastern) promised to consent to the *Arians*, if they would first subscribe to the *Nicene* Creed. But *Valence* and *Ursacius*, the chief Leaders of that Faction withstood them. Then followed the degrading of the Bishops, and the corrupt Ecclesiastical determination. This was effected specially that they might allure *Liberius* Bishop of *Rome*, either by Gifts or Threats to their way, who is reported thus Heroically to have answered the Emperor (who had judg'd him to be banished to *Thrace*, and offered him the charge of his Journey) viz. *Thou hast robbed the Churches of the Earth, and now offereest to me Condemned and Indigent, an Alms; Go first and become a Christian thy self.*

At *Ariminum*,
An. 363.

At *Ariminum* in *Italy* about the year, 363. was held a National Council, consisting of more than Four hundred Western Bishops, under the Emperor *Constantius* in the 22th year of his Reign, at the motion of the *Arians*, to whose Opinions the said Emperor was flexible enough; but the major part of the said Bishops rejecting the motions made in favour of the *Arian* Error, touching the Son of God, adhered closely to the *Nicene* Faith. This *Ariminum* is (it seems) famous for Two Councils; the one Orthodox and lawfully called, which is that aforementioned. The other Heretical and Tyrannical, craftily called by the *Arians* under the notion of the Council held at *Ariminum*, that this false one might extinguish the true one; whereof the greater part determined the *Nicene* Creed punctually to be observed, and the Sons equality with the Father in Essence to be asserted: The Decrees of the Synod at *Sirmium* to be rejected: and *Ursacius* and *Valence* with the *Arians*, their Followers, to be Excommunicated.

At *Selencia*,
An. 363.

At *Selencia* in *Isauria*, which lies between *Lycaonia* and *Cilicia*, whence *Paul* and *Barnabas* sailed to *Cyprus*, *Act.* 13. 4. was a Council of 160 Oriental Bishops, held the same year, wherein the said National Council of *Ariminum* was held, viz. An. 363. The business of this Council, procured (as the former) by the *Arians*, was much prevented by a Contest arising touching precedency of Debates, as whether the matter of Faith, or the Lives of such as were to be accused, should first fall under Examination. At this time there being Convened at *Ariminum* 600 Bishops (according to *Bellarmine* out of the *Chron.* of *Ferome*) of which the Eastern *Heterodox* being overpower'd both in Number and Arguments by the

Orthodox

Orthodox, the Emperor *Constantius* removes them unto *Seleucia* in *Isauria* aforesaid. Here the *Acatians* altogether reject *Consubstantiality*, the *Semi-Arians* admit it in their sense: In this dissention the *Semi-Arians* prevail; and determine; That the Form of Faith composed at the Dedication at *Antioch*, should be retained and subscribed unto; but they ejected the dissenting *Acatians* or *Arians* from their places.

At *Constantinople*, where the *Acatians* remained after the Council at *Seleucia*, were Assembled by them about 50 Bishops out of *Bithynia* and other adjacent parts. In this Synod they confirmed the Sum of Faith read in the Council of *Ariminum*.

At *Antioch*, in the 25th year of *Constantius* his Reign another Council was Convened, with design or ordering matters so, that for the time to come no man should call the Son of God *Consubstantial* with the Father, nor yet of a different substance from the Father, but neither in this Council could the *Arians* perfect their intended purpose of inventing a new Sum of Faith.

At *Laodicea*, not that *Laodicea* nigh *Antioch* in *Syria*, but at *Laodicea* the Metropolis of *Phrygia*, and one of the seven Churches of *Asia*, to which *John* in his Banishment wrote from *Patmos*. At this *Laodicea* a Synod was assembled about the year 368, wherein nothing was determined concerning matters of Faith, only the worshipping of Angels was damned as an horrible Idolatry, and a forsaking of Christ; also the Books of the Canonical Scriptures were particularly set forth, wherein no mention was made of the Books of the *Machabees*, of *Ecclesiasticus*, or other *Apostorhal* Books.

In *Illyricum*, about the year, 370. under the Emperors *Valentinian* and *Valens*, not yet infected with the *Arian* Heresie, was held a Council, wherein the *Nicene* Faith had confirmation and allowance.

At *Lampsacum* nigh the *Hellepont*, under the Emperor *Valens* was a Synod of *Macedonian* Hereticks, who ratified the Council of *Seleucia*, and damned that of *Constantinople* by the *Acatians*.

At *Rome* under the Emperor *Valentinian* in the West, *Damasus* Bishop of *Rome* Convened a Council, wherein was confirmed the *Nicene* Faith.

At *Constantinople*, in the year, 383. under *Theodosius* the Emperor, was a General Council held, consisting of 150 Bishops, whereof 36 were infected with the *Macedonian* Heresie, which Blasphemously held the *Holy Ghost* to be a Creature, a Minister and Servant, not *Consubstantial* with the Father and the Son. From this Council the said Hereticks having withdrawn themselves, they

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which

At Antioch.

At Constantinople.

At Antioch.

At Laodicea, An. 368.

In Illyricum, An. 370.

At Lampsacum, Socrat. l. 4. c. 6. Sozom. l. 5. c. 7.

At Rome, Theod. l. 2. c. 22.

At Constantinople. An. 383. Theod. l. 5. c. 6.

which remained in Council, larned the Heresie of *Macedonius*, and confirmed the *Nicene* Faith, with ampliacion of that part of the Symbol which concerned the Holy Ghost, in this manner, *viz.* I believe in the Holy Spirit our Lord, Giver of life, who proceedeth from the Father, and with the Father and the Son is to be worshipped and glorified. This Council was held under *Gratian* and *Theodosius* the Great, and *Damasus*. They condemned and discharged *Macedonius* Bishop of *Constantinople*, for his perfidious opposing the Deity of the Holy Ghost, together with *Maximus Cynicus* by reason of his Doctrine against Discipline. The Emperor null'd all Confessions, except that of those who acknowledged Christ Consistent with the Father, which our present Liturgy retains under the name of the *Nicene* Creed. It is thought that *Gregory Nazianzen* compiled it, according to the sense of the Synod.

Longus ex Lombard. l. 1. Sem. D. 11.
Renouart. & Alijs. Theod. Hist. l. 5. c. 6. &c. 10.

At *Constantinople*.

Theod. l. 5. c. 9.

At *Constantinople*.

At *Carthage*.

At *Nice*,
A.D. 325.

At *Constantinople* under *Theodosius* another Council was held, whence a Synodick Letter was sent to the Bishops then Conven'd at *Rome*, declaring the Troubles they sustained by Hereticks; and as to matters of Discipline, recommended unto them the Canons of the Council of *Nice*. At *Constantinople* in the Fifth year of *Theodosius* his Reign, a great National Council was again Conven'd, wherein the Hereticks were divided among themselves touching what Credit they should give in matters of Faith to the Fathers that preceded their time; whereupon that good Emperor rent in pieces the Sums of the *Arian*, *Nestorian* and *Macedonian* Faith, and Ordained the *Homousian* Faith only to take place.

At *Carthage* the Second Council was assembled under *Theodosius*, nigh the time of the foresaid General Council held at *Constantinople*, wherein the *Nicene* Faith was confirmed, abstinence from Matrimonial Society with Infidels, and Hereticks recommended to Ecclesiastical Persons.

At *Nice* there was another Council, A.D. 181, under *Constantine*, which wholly restored the Images and Statues of *Irene*, together with the Reliques formerly broken in pieces by *Leo Isaurus* his Grandfather, and *Constantine Copronymus* his Great Grandfather, the business being chiefly promoted by *Gregory* the Second and the Third, together with *Adrian* the First, and *Tarasmus* Patriarch of *Constantinople*. There met at this Council (which is one of the Greek or Eastern Oecumenical Councils): 350 Bishops, who with the said *Tarasmus* President of the said Council, by 22 Canons condemned Image-breakers for Hereticks. *Beilarmine* and *Baronius* imagine that this Synod was condemned by the Fathers at the Council of *Frankfort* under *Charles* the Great, which yet is denied by *Dominius*, *Savins*, and others, according to *Longus*, pag. 632.

Ar

At Carthage a Third Council was Assembled, in the year, 399. at which *Augustine* Bishop of Hippo was present, wherein it was (*inter alia*) Ordained, That the Bishop of Rome should be called the Bishop of the First Seat; but not the High Priest, or the Prince of Priests. Likewise, that nothing except the holy Canonical Scriptures should be read in Churches, under the notion of Holy Books.

At Carthage,
An. 399.

Can. 40.

Can. 47.

At Carthage a Fourth National Council was held under the Reign of *Honorius* about the year, 401. consisting of 214 Bishops, at which *Augustine* Bishop of Hippo was also present, and wherein were nigh as many Canons made as were Bishops assembled; wherein among other things it was Ordained, That a Bishop should admit no man to a Spiritual Office without Advice of the Clergy; nor pronounce any Sentence without such Advice: That Refusers to pay unto the Church the Oblations of persons Deceased, should be Excommunicated. Whereby it appears, That Oblationes Defunctorum were not Soul-Masses said for the Dead, but Charity by way of Testamental Legacies.

At Carthage,
An. 401.

Can. 22, 23, 94.

At Cyprus under the Reigns of *Arcadius* and *Honorius* was Assembled a Council by *Epiphanius*. And at Alexandria by *Theopophilus*, under pretence of damning the Books of *Origen*. Also at Constantinople by the malice of *Eudoxia*, the Wife of *Arcadius* the Emperor, to depose *John Chrysostome* Bishop of Constantinople.

At Cyprus.

At Alexandria.

Constantinople.

At Carthage about the year, 419. a Fifth Council was held, wherein the Opinions of *Pelagius* and *Celestius* were damned as Heretical; and whereby it was declared, That the Adoration of Reliques was at this time the Custom of *Ethnicks*, and appointed, That Supplication should be made to the Emperors, That such Reliques as were found in Images, Groves, and Trees, or elsewhere, should be abolished.

At Carthage,
An. 419.

At Toledo in Spain under the Reigns of *Arcadius* and *Honorius*, was a Council assembled for Confirmation of the *Nicens* Council, and refutation of some Errors.

At Toledo.

At Melvium in Numidia was Assembled under the Reign of *Arcadius* a Council, whereof *St. Augustine* was President; which was Assembled chiefly to finish the work begun at the Fifth Council of Carthage, in condemning the Heresies of *Pelagius* and *Celestius*, concerning the power of Mans Nature, not supported by the Grace of God, and Free Will of Man, to do good of it self; as also to inhibit Appeals to Bishops beyond Sea, on pain of being excluded from the Communion of all African Bishops.

At Melvium.

Can. 22.

At Carthage,
An. 402.

Hist. Magd.
Cent. 5. cap. 9.

At Bagai,
An. 434.

At Ephesus,
An. 434.

The Mother of
Christ, not the
Mother of God.

Vid Liberat. in
Breviar. ca. 11.

At Carthage, in the year 402. under *Honorius* and *Theodosius* the Second; a National Council of 217 Bishops was assembled; which continued for the space of Six years: The business of this Council was prevented by a Controverſie hapning between them and the Bishops of *Rome*, who ſucceſſively endeavoured (but not ſucceſſfully) to perſwade the *African* Bishops, that they were under the Sovereignty and Jurisdiction of the Bishops of *Rome*; to whom this Council would not allow of any Appeal from the Bishops of *Africa*.

At Bagai in *Africa*, about the year 433. certain *Donatiſts* to the number of 310 aſſembled themſelves in Council, chiefly for the depolition of *Maximinianus* Biſhop of *Bagai*, whom they Depoſed and Accuſed, becauſe he had renounced their Heretic, and had recovered many others from the Error of that way.

At *Ephesus*, in the year 434. and in the Eighth year of the Reign of *Theodosius* the Second, by ſome called *Theodosius* the Younger, was a General Council aſſembled againſt the Heretick *Nestorius* Biſhop of *Conſtantinople*; which Council conſiſted of above Two hundred Biſhops, by Command from the Emperor: By which Council *Nestorius*, for his heretic in denying the Son of the Virgin *Mary* to be God, and conſequently the Perſonal Union of the Divine and Humane Nature of *Chriſt*, was baniſhed to *Oaſis*. This was the firſt General Council of *Ephesus*, promoted by *Celeſtine* the Firſt, wherein Two hundred Biſhops (as aforeſaid) condemned *Nestorius*, together with *Carisius* his flattering Preſbyter, who inſtead of Two Natures acknowledged divers Perſons in *Chriſt*, and therefore pleaded that the Bleſſed Virgin *Mary* ſhould be ſtyled *χρῆστος* only, and not *θεός*. In this Council *Cyrillus* of *Alexandria* is recorded Preſident, whom *Nestorius*, being piously and brotherly invited to a better Opinion, proudly contemned, and having craftily allured *John* of *Antioch* to his Party, Anathematiz'd him and the Council, who had formerly Anathematiz'd him. The matter being related to the Emperor, and thoroughly underſtood, *Cyrillus* and his are cleared, but *Nestorius* with his Party is baniſhed (as aforeſaid) to *Oaſis*, a Sandy habitation, where like another *Cain* (ſays a Modern Hiſtorian) roving here and there, blaſpheming, at length his Tongue being conſumed and eaten up by Worms, he breathed out his laſt. There are (it ſeems) two Copies of this Council, the firſt obſerving Eight, the ſecond Thirteen Canons, which are comprehended in the Anathema's of *Cyrillus*. The *Maſſilianites*, termed alſo *Ouebites* and *Entuſiaſts*, were condemned by this Council, and thereby the integrity of the *Nicene Creed* confirmed.

At *Ephesus* under *Theodosius* the Second was likewise a particular Council assembled by *Flavianus* Bishop of *Constantinople*, who condemned *Eutyches* an Abbot of *Constantinople*, for Affirming, That in Christ, after the Union of the Divine and Humane Natures, there were no longer two Natures; which absurd Opinion *Flavianus* damned as Heretical. So that the occasion of this Second Council of *Ephesus*, An. 449. was this: *Eutyches* and *Archimandrite* of *Constantinople*, who after *Manes* and *Apollinaris* denied the Flesh of Christ to be like ours; but affirmed, that falling from Heaven like the Rays of the Sun, it penetrated the Virgins Womb. And so he denied that two Natures were in Christ Incarnate; but asserted, that his Flesh was changed into his Divinity; for which he was (as aforesaid) condemned by *Flavianus* Patriarch of *Constantinople*, and *Eusebius* Bishop of *Doris*, and others their Associates; yet by the help of *Chrysapheus* the Eunuch, and *Eudoxia* the Empress, whom he had seduced, he prevailed with *Theodosius*, that the matter might be determined by a famous Synod; for which reason this at *Ephesus* by the Emperors Authority was called, where 128 Bishops met, *Dioscorus* of *Alexandria* being President, one so full of *Eutychianism*, that *Eutyches* is absolved, and the Reclaimers forced (says the Historian) to subscribe by Club-Arguments. *Flavianus* opposing it, was so furiously trodden upon, that three days after he died; besides, many very Learned Bishops discharged of their Places: yet not long after all this was dashed in pieces by the most famous Council of *Calcedon*.

At *Ephesus*,
An. 449.

Vld. *Liberal. in*
Breviar. ca. 12.
Evang. c. 9, 10.
Nicph. l. 14.
c. 57.

At *Berytus* in *Phanicia* was held a Council about this time, wherein the Cause of *Ibas* Bishop of *Edessa*, whom *Dioscorus* had deposed, was revived, and himself justified and absolved.

At *Berytus*.

At *Agatha* in *France* was a Council held, wherein nothing was more remarkable, than that they had liberty to meet together by the Command of *Alaricus* King of *Goths*, who at that time had the Sovereignty in that part of *France* called *Gallia Narbonensis*; whence it appears, That Councils both General and National were in all Countries Convened by the Authority of Sovereign Princes.

At *Agatha*.

At *Chalcedon* in *Birbynia*, in the year, 455. and in the Fourth year of *Marcianus* the Emperor was a General Council, at which was present in Person the Emperor, and 630 Bishops and Reverend Fathers from most parts of the World. In this Council *Dioscorus* Bishop of *Alexandria*, together with *Eutyches* and *Juvenalis* Bishops at *Jerusalem*, was condemned as an Heretick, for absolving the Heretick *Eutyches* in the Council at *Ephesus*, and acting other Crimes, whereof he was then accused. In this Council it was Ordained, That men should believe that the Natures of Christ, albeit that

At *Chalcedon*,
An. 455.

that they were united, yet were they not confounded, as *Eutyches* had Heretically affirmed. Also in this Council it was Ordained, That *Anatolius* Bishop of *Constantinople* and his Successors, should have the chief Dignity next unto the Chair of *Rome*. This Council was called by the said Emperor *Martianus* against the said *Eutyches* Abbot of *Constantinople*, and his Champion *Dioscorus* of *Alexandria*; the supposititious Acts of the Council held at *Ephesus* were condemned by this Council, those of *Ephesus* being in favour of *Eutyches*, who affirmed one only Nature to be in Christ, viz. his Divine Nature, after his Incarnation. It is not clear or certain, who was President of this Council of *Chalcedon*, excepting the Emperor, and Judges Moderators: The matters thereof were for the most part by favouring Parties between *Leo* the first of *Rome*, and *Anatolius* Patriarch of *Constantinople*.

At *Ravenna*,
Cent. 6.

At *Ravenna* in the Sixth Century was a Council assembled by occasion of the Schism happening on the Election of *Symmachus* to the See of *Rome*, whose Competitor was *Laurentius*, afterwards made Bishop of *Nuceria*. In *Symmachus* his time were no less than Six Councils held at *Rome*, all convened by Authority of *Theodoricus* King of *Goths*, who then Reigned in *Italy*, and all of little importance, otherwise than the Endeavours that then were for the Supremacy, whereto they aimed.

At *Valencia*.

At *Valencia* in *Spain* were assembled two Councils, called *Ilerdensis* and *Valentinus*, both very obscure Councils, there being in the one but Eight Bishops present, and only Six in the other. In the first of these Marriage was prohibited the time of *Lent*, and three weeks before the Feast of *St. John the Baptist*, and during the time between *Advent* and *Epiphany*.

At *Sidon*.

At *Sidon* in the Twentieth year of the Emperor *Anastasius* a National Council of 80 Bishops was assembled, by the procurement of *Xenias* Bishop of *Hierapolis*, for undoing the Council of *Chalcedon*, which, as far as in them lay, they did accordingly.

At *Orleans*.

At *Aurelia*, that is, *Orleans* in *France* in the 22th year of *Anastasius*, and under the Reign of *Clodoveus* King of *France*, were convened 32 Bishops, on purpose to settle some Order in Ecclesiastical Discipline, which by reason of the irruption of Barbarous people into the Country of *France*, had been brought into great disorder.

At *Gerunda*.

At *Cesar-*
augusta.

At *Gerunda* and *Cesar Augusta* in *Spain* were two Councils under *Theodoricus* King of *Goths* then Reigning in *Spain*. In the former of these were only Seven Bishops convened, who made some Constitutions, chiefly about Baptism: In the later were Eleven Bishops, and they in opposition to Superstition and the *Manichean* Heretics, prohibited Fasting on the Lords-day.

At

At Rome in the sixth Century, by the Mandate of *Theodoricus* King of *Gotthes*, Reigning in *Italy*, a Council was assembled by *Hormisdas* Bishop of *Rome*, wherein the Error of *Eutyches* is damned *de novo*, and Embassadors sent to the Emperor *Anastasius*, and to the Bishop of *Constantinople*, to divert them from that Error.

At Rome,
Cent. 6.

At *Constantinople* in the same Century under the Emperor *Justinus* was another Council convened, wherein many great Accusations were exhibited against *Sergerus* Bishop of *Antioch*, who was then condemned of Heresie, and afterwards banished by the Emperor.

At Constant.
Cent. 6.

At *Toledo* in the same Century was a second Council assembled, partly for renewing Ancient Constitutions, and partly for making New in order to Ecclesiastical Discipline. By the first Canon of this second Council of *Toledo*, Marriage was tolerated to such of the Clergy, as on their initiation to that Function protested that they had not the gift of Continency.

At Toledo,
Cent. 6.

At *Constantinople* in the year 532. under *Justinian* was another Council consisting of one hundred sixty five Bishops. *Menes* being President, or rather his Successor, *Eutychius* Patriarch of *Constantinople*; but Pope *Vigilius*, who came to *Constantinople* to Summon the Emperor, yet would not himself be present at the Council, lest a seeming yielding to *Eutychius* might be prejudicial to his Supremacy. The Emperor endeavoured to reconcile the *Eutychians* and the Orthodox for the publick Tranquillity, and therefore would have revoked the Articles concerning the condemning of *Theodorus* of *Mopsuestia*, and of *Theodoret* against *Cyrillus* that was Anathematiz'd. But the Western Churches with Pope *Vigilius* constantly opposed it, and confirming not only the Decrees Anathematizing those Hereticks with their Heresies of former Councils, but also of *Chalcedon*. The Errors of *Origen* also expunged, which either denied the Divinity of Christ, or the Resurrection of the Body, or affirmed the Resurrection of Reprobates and Devils. Consult concerning this Council, *Zonar. in vit. Justinian*. If this be that Council which some report to have been at *Constantinople* under the Emperor *Justinian* in the year 551. there appears above twenty years difference in computation of Time. This Council is said to have been occasioned chiefly for pacifying the Controversie between *Eustochius* Bishop of *Jerusalem*, and *Theodorus Ascidas* Bishop of *Cæsarea-Cappadocia*, touching *Origens* Books and Tenets, as also for the determination of other contentious Disputations. In this Council a Question was moved, Whether Men that were dead, might lawfully be Cursed and Excommunicated? To which it was answered, That as *Josias* not only punished Idolatrous Priests

At Constantino-
ple, An. 532.

Vid. Niceph. l.
17. c. 27.

Grigor. l. 1.

Ep. 24.

Evang. l. 4. d. 34

Liberat. in

Brut. c. 23, 24.

- 2 Kin. 23. 16. while they were alive, but also opened the Graves of them that were dead, to dishonour them after their Death, who had dishonoured God in their life time: Even so, the Memorials of Men might be accused after their death, who had disturbed the Church of Christ in their life.
- At Orleans. At Orleans under Childebertus King of France were frequent Meetings and Assemblies of Bishops, viz. the 2, 3, 4, 5, Councils, whereby many Constitutions were made prohibiting Marriage to Priests; and in the fourth Canon of the second Council *Simony* was damned.
- At Orléans. At Orléans in France under Theodobertus King of France, the Bishops who were present at the Councils of Orleans, did assemble and ordained, That no Man should presume to the Office of a Bishop by favour, but by merit.
- At Tours. At Tours under Aribertus King of France a Council was held, wherein Provision was made against such Poor as wandered out of their Parishes. In this Council several Constitutions also were made relating to Bishops and the other Clergy in reference to Marriage.
- At Paris. At Paris a Council was held, wherein order was taken concerning the Admission of Bishops to their Offices, and that not to be by favour, but with the consent of the Clergy and People.
- At Toledo. At Toledo assembled a Council of 62 Bishops, where Recaredus King of Spain, and the whole Nation of the West-Goths in Spain renounced the Arian Heretic.
- At Constanti-
nople. At Constantinople under the Reign of Mauritius a Council was held, for trying the Cause of Gregorius Bishop of Antioch accused of Incest, but declared to be Innocent, and his Accuser scourged with Rods, and Banished.
- Cent. 4. cap. 9.
- At Matiscon. At Matiscon about the time of Pelagius the second, a Council was held; wherein command was given, That none of the Clergy should Cite another, bearing a Spiritual Office, before a Secular Judge. And that she who is the Wife of a Man that becomes a Bishop or a Presbyter should after such Dignity become his Sister, and be exchanged into a Brother.
- Can. 8.
- At Matiscon. At Matiscon another Council was convened under Gunthranus King of France in the 24th year of his Reign, wherein It was ordained, That Children should be Baptized at Easter and Whitsuntide; and that Secular Men should reverence the Clergy.
- Can. 3. 12.
- At Rome, AD. 595. At Rome in the year 595. and in the thirteenth year of the Reign of the Emperor Mauritius, was a Council assembled of 24 Bishops, and 34 Presbyters, wherein the first four General Councils were confirmed; and that for Ordination of Men in Spirituals, no Reward should be given or taken.

Before the Conclusion of this sixth Century, and precedent to the Councils last mentioned, there were some other Councils of less moment, such as *Concilium Gradense, Braccarense, Lateranense, Lugdunense, Eboracense, & Mense*, which being for the most part employed chiefly in damning Old Heresies, and in contentious Disputations, are here omitted.

At Rome in the year 607. under Phocas the Emperor, a Council of 72 Bishops, 30 Presbyters, and 3 Deacons, was assembled. In this Council the privilege of Supremacy given by Phocas to the Roman Church was published. And in the eighth, that is, the last year of Phocas, Boniface the fourth assembled another Council at Rome, wherein he gave power to the Monks to Preach, Administer Sacraments, hear Confessions, to bind and loose, and associate them in equal Authority with the Clergy.

At Rome,
An. 607.

At Braga or Bracara in Portugal, An. 610. under the Reign of Gundemarus King of Gothes assembled some Bishops of Galicia, Lusitania, and of the Province of Lucensis, whereby it was ordained, That every Bishop should visit the Churches of his Diocese; That they should receive no Rewards for Ordination of the Clergy; And that a Church builded for Gain, and Contribution of the People, redounding to the advantage of the Builder, should not be Consecrated.

At Braga,
An. 610.

At Auxerre in France, An. 613. assembled a number of Abbots and Presbyters, with one Bishop and three Deacons. In this Synod they damned Sorcery, made many Superstitious Constitutions, as touching Masses, Burials, Marriages, Prohibition of Meats, &c.

At Auxerre,
An. 613.

At Hispalis, commonly called Sevil le Grand, in Spain, in the year 634. and in the 24th year of the Emperor Heraclius a Council was assembled by Isidorus Bishop of Hispalis, at the command of King Sisebutus, for suppression of the Heresie of *Nicholaos*, a Branch of the Eutychian Heresie, and for the decision of some Questions touching the Bounds of their Diocesses.

At Hispalis,
An. 634.

At Toledo in Spain, An. 639. under the Reign of Sisenandus King of Spain, by the Kings command were more than 70 Bishops and Presbyters convened upon occasion of diversity of Ceremonies and Discipline in that Kingdom. This was the fourth Council at Toledo.

At Toledo,
An. 639.

At Toledo in the first year of Chintella King of the Gothes, about the time of the Emperor Heraclius's Reign, a fifth Council was held, conven'd by Eugenius Bishop of Toledo. In this Council nothing considerable was done, but in reference to Annual Litanies, and the appointment of Supplications for the King.

At Toledo.

At Rome,
An. 652.

At Rome in the year 652. was a Council convened by *Martinus* Pope, consisting of more than 100 Bishops, occasioned by the Error of the *Monothelites*, obstinately maintained by *Paulus* of *Constantinople*, and countenanced by the impious Edict of the Emperor *Constantine*. The Constitutions and Decrees made in this Council tended to condemn those that denied the *Trinity*, the Divine Unity in the Divine Nature, the Manifestation of the second Person of the *Trinity*, and his Sufferings in the Flesh.

At Toledo,
An. 653.

At Toledo in the year 653. a sixth Council was held, consisting of fifty two Bishops, whereof *Eugenius* Bishop of Toledo was President. The occasion whereof was the Renovation of Old Heresies, and Contradiction to precedent Councils. The fourth Canon of this Council is against *Simony*, and the eighteenth is against *Rebellion*.

At Toledo,
An. 662.

At Toledo in the year 662. a seventh Council is held, of 4 Archbishops, 50 Bishops, and many Presbyters. The first Canon of this Council is against *Sedition* and *Treason*. By the fourth Canon it is forbidden, That Bishops in their *Visitation*, should extort, or oppress their Churches.

At Quinisext,
An. 662.

At *Quinisext* (so termed by *Balsomon*) the same year, viz. 662. was held a Council, which by *Bede* and many others is accounted an Erroneous Synod; it was convened under *Justinian* the second and Pope *Sergius*, wherein the Fathers thought fit to supply the defect of the fifth and sixth precedent Synods in reference to *Manners* and Ecclesiastical Discipline, for which reason they ratified 102 Canons, in the † *Trullo* of the Imperial Palace, whence they are called *Trullan*. These are rejected by such *Latins*, whose consent went not to the establishment thereof, specially not empower'd and authoriz'd thereto by the Pope. In the 36th Canon thereof the Patriarch of *Constantinople* is equalled to the *Roman*, and in the 13th Canon Matrimony is granted to the Clergy.

At Chabillonum
or Chalon.

At Chalon in *Burgundy* by the command of *Clodoveus* King of *France* a Council of 44 Bishops assembled, wherein the Canons of the *Nicene* Council had great approbation; And it was forbidden, That two Bishops should be Ordained in one City; and Decreed, That no Secular Work should be done on the Lords-Day.

At Rome.

At Rome in the time of *Constantinus Pogonatus* Emperor under the Popedom of *Agatho* was held a Council, wherein it was declared by the Suffrages of 125 Bishops, That two Wills and two Operations were to be acknowledged in Christ; and the Defenders of the Heresie of the *Monothelites* were condemned.

At Toledo,
An. 671.

At Toledo in the year 671. an eighth Council of 52 Bishops was assembled, wherein were high debates concerning *Perjury*; At last it was resolved, That no Necessity obligeth a Man to perform an unlawful

lawful Oath. In this Council *Marriage* was utterly forbidden to Bishops, and eating of *Flesh* in *Lent*.

At *Toledo* in the year 673. and in the seventh year of *Rasefurvin-* At *Toledo*,
us King of *Gotbes*, and by his command, where convened sixteen An. 673.
 Bishops; which was the ninth Council at that place; and in
 which several Canons were made touching the Discipline of the
 Church.

At *Toledo* in the eighth year of the said Kings Reign was the At *Toledo*,
 tenth Council, consisting of 21 Bishops, who made some Decrees An. 647.
 touching certain *Festivals*, and others relating to the *Clergy*, and
 removed *Protadius* Bishop of *Bracara* from his Office, being con-
 vict of *Adultery*.

At *Toledo* in the seventh year of *Bamba* King of *Gotbes* 19 Bi- At *Toledo*.
 shops and seven Abbots were assembled by the Kings command,
 wherein several Canons were made concerning Ecclesiastical Dis-
 cipline.

At *Bracara* a second Council was held (the first according to At *Bracara*.
Caranza.) wherein many old Opinions of the *Priscilianists* and
Manicheans concerning Prohibition of *Marriage* and *Meats* are
 condemned; together with the Heresies of *Samosatenus*, *Photinus*,
Cerdon, and *Marcion*: And in the 30th Canon of this Council it
 was ordained, That no *Poesie* should be sung in the Church, except the
Psalter of the *Old Testament*.

At *Bracara* in Spain in the time of *Bombas* King of *Gotbes* ano- At *Bracara*.
 ther Synod of eight Bishops was assembled, wherein the *Nicene*
Faith is again rehearsed. In the fifth Canon of this Synod it is
 ordained, That Upon *Festival* days *Reliques* enclosed in an *Ark*, shall
 be born on the Shoulders of the *Levites*, as the *Ark* of *God* in the *Old*
Testament was accustomed to be born.

At *Constantinople* in the year 680. in the twelfth year of the At *Constantinople*.
 Reign of *Constantine Pogonatus* a General Council was held, Pope An. 680.
Agatho procuring it by his *Legates*. In this Council were convened
 150 Bishops (they who reckon 270 or 286 do compute the absent
Romans, and others consenting thereto,) the Emperor himself was
 President. In this Council was discussed the Question touching the
 Wills and Actions of *Christ*: here were condemned the *Monotheli-*
tes, *Sergius*, *Cyrus*, *Pyrrhus*, *Peter*, *Paul*, *Theodorus*, together
 with Pope *Honorius*; who in the defence of *Eutychianism* pleaded,
 that there was one only Will in *Christ*. This Council confirmed
 the Canons, not only of general, but also of particular foregoing
 Synods, as of *Antioch*, *Laodicea*, and others. It also added, what
 was to be approved in the Orthodox Writing of the Fathers, as
 appears by the second Canon of this Council. *Vid.* *Paul. Diacon.*
in vit. Constant.

At

At Toledo.

At Toledo the twelfth Council, consisting of 33 Bishops with some Abbots, and 13 of the Nobility, assembled the first year of the Reign of *Euricius*, to whom *Bombas* King of the *Goths* resigned his Royal Authority, chusing rather to be Shaven than to wear a Crown, and to enter into a Monastery than to sit on the Throne of Majesty. This Council (as to the Confession of Faith) adhered to the Council of *Nice*, and confirmed the Acts made in the precedent Councils against the *Jews*. Other Councils there were at Toledo under the Reigns of *Euricius* and *Egista*, but not of such Remark as needs any apology for their omission.

At London,
An. 712.

At London in the year 712. under the Saxons Reign a Council was assembled, at which the Popes Legate *Bonifacius*, and the chief Prelate of England *Brithwaldus*, was present. The two grand Points treated in this Council, were concerning the *Worshipping of Images*, and Prohibiting *Marriage* to persons in Spiritual Orders.

At Constantino-
ple, An. 712.

At Constantinople about the same year of 712. a Council was called by the Emperor *Philippicus*, for the undoing the sixth General Council, wherein the Error of the *Monothelites* was condemned.

At Rome,
An. 714.

At Rome in the year 714. a Council was assembled by Pope *Gregory* the second, whereat two Bishops of *Britain* were present, *Sedulius* and *Fergusus*. Most of the Canons made at this Council did concern *Marriages*, *Masses*, *Sorceries*, and the *Mandates of the Apostolick Chair*.

At Rome.

At Rome a great Council of 903 Bishops was assembled by Pope *Gregory* the third, having received a Mandate from the Emperor *Leo* for the abolishing of Images. In this Council was the Emperor *Leo* excommunicated, and deprived of his Imperial Dignity, because he had disallowed the *Worshipping of Images*. Now is the Popes Banner displayed against the Emperor, which is the Forerunner of that Enmity which ensued between the Pope and the Emperors.

In France,
AD. 742.

In France in the year 742. under the Reign of *Charles* the Great, *Zacharias* the First being then Pope, a National Council of the Bishops, Presbyters, and Clergy of France was assembled by *Bonifacius* Archbishop of *Mentz*, according to the Mandate of King *Charles*. This Council was called for Reformation of *Abuses* in that Country, or rather to reduce it to a conformity unto the Rites of the *Roman Church*.

At Constantino-
ple, An. 755.

At Constantinople in the year 755. and in the thirteenth year of the Emperor *Constantinus Copronymus*, a General Council of 338 Bishops was assembled by the Emperors Command. In this Council the *Worshipping of Images* was damned, and the placing of them in *Oratories* and *Temples*, as a Custom borrowed from the

Pagans,

Pagans was forbidden; yet in the 151st and 171st Canons of this Council the Invocation of Saints is allowed. The Council of *Constantinople* is by some accounted two, which others contract into one, but the distinction (it seems) is manifest, because the first is said to be celebrated under Father *Leo Isaurus*, An. 730. the second by *Constantius Copronymus* in the year 755. as aforesaid. The one opposeth the worshipping of Images and Reliques, on which account both may be esteemed as one, or at least united. The first under *Leo* discovers Intercession of Saints to be imaginary, and the worshipping of Images meer Idolatry. *Germanus* Patriarch of *Constantinople*, and *John Damascene*, and others, too much inclined to Images, are deprived of their Dignities. *Gregory* the third intercedes for Images in a *Roman* Anti-Synod, in which he excommunicated the *Eastern* with the mark of Heretical Image-breakers; but this did not terrifie the said *Constantine Copronymus* from declaring himself to be an Image-breaker; but assembled 338 Bishops at *Constantinople*, as aforesaid, over whom himself was President, and persecuted the Maintainers of Images. Some will have This and the seventh Council as Oecumenical; but the *Romans* so abhor'd it, that for this Controversie about Images they denied their Subjection to the *Greek* Emperors: whence afterwards ensued the Western and Eastern Division, never to be reconciled. How well the *Nicene* Council corrected the Errors of this appears by the Decrees thereof.

An. 730/ Bell.
de Concl.
l. i. c. 6.

Vld. Paul. Diac.
l. 21, 22.
Rerum Rom. &
Zonar. in
Annal.

At *Frankfurt* in the year 794. a Council was convened, but it is not agreed, whether it was an Oecumenical or Provincial Council; the more Ancient Writers will have it to be Oecumenical, because it was called by *Charles* the Great, and *Adrian* the First, and it consisted of at least 300 Bishops; yet the later Writers will have it Provincial, because it seems not to favour Images. The reason of the convening this Council was, because *Elipardus* Archbishop of *Toledo*, and *Felix Urgelitanus* Bishop of *Aurelia* or *Orleanse* in *France*, preached, That Christ was only the adopted Son of God, which *Aquinas* refutes 3 part. q. 23. art. 4. But *Binius* with *Longus* and others will have it, that this Council or Synod confirmed the Opinion of the 2^d *Nicene* Council concerning the Adoration of Images, which *Bellarmino* will not believe, though he wishes it to be true.

At Frankfurt,
An. 794.

At *Nice* in *Bythinia* in the year 788. a Council of 350 Bishops was assembled; in which it was ordained, That the Image of Christ, the Blessed Virgin Mary, and of the Saints should not only be received into places of Adoration, but also should be adored and worshipped.

At Nice, 783.

At *Frankford* in the year 794. a great Council was assembled by *Charles* the Great, King of *France*, partly by reason of the

At Frankford,
An. 794.

Here-

Heretick *Felix*, who called Christ the adopted Son of God in his Humane Nature, and was condemned in a Council at *Ratisbone*, *An.* 742. partly also by reason of great Disputes that were in most places concerning the *Worshipping of Images*, disallowed in the Council of *Constantinople*, but allowed in the second Council of *Nice*.

At *Mentz*,
An. 815.

At *Mentz* in the year 813. by the command of *Carolus Magnus*, was assembled a Council of 30 Bishops, 25 Abbots, with a great number of Priests, Monks, Counts, and Judges, about Reformation of the dissolute manners of Ecclesiastical and Lay-persons.

At *Rhemes*,
An. 813.

At *Rhemes* in the same year 813. a Council was assembled by the command of *Charles* the Great, who not only called that famous Council of *Frankford*, *An.* 794. in which the *Adoration of Images* was condemned, but also about one and the same time, *viz.* *An.* 813. appointed five National Councils to be convened in divers places for Reformation of the Clergy and Laity, *viz.* at *Mentz* aforesaid; this at *Rhemes*; another at *Tours*; a fourth at *Chalons*; and a fifth at *Arles*. In all which no opposition was made to the aforesaid Council of *Frankford*, nor was the Adoration of Images avowed in any of these Councils.

At *Tours*,
An. 813.

At *Tours*, *An.* 813. at the command (as aforesaid) of the Emperor *Carolus Magnus* a Council of many Bishops and Abbots was assembled, for the establishing of Ecclesiastical Discipline in *Tours*.

At *Chalons*,
An. 813.

At *Chalons*, *An.* 813. was the fourth Council convened the same year under *Charles* the Great, and by his Command, for the Reformation of the Ecclesiastical State; the Canons whereof for the most part are consonant to those made in the said former Councils under *Charles* the Great.

At *Arles*, 813.

At *Arles* the same year of 813. wherein the four preceding Councils were held, another was convened by command of *Charles* the Great, wherein, as to matters of Faith, Church-Discipline, Regulation of the Clergy, Reformation of Manners, &c. the Canons generally agree with those of the said four preceding Councils.

At *Constantinople*,
An. 871.

At *Constantinople* in the year 871. in the third year of *Basilius* Emperor of the East, and under the Reign of *Lewis 2d* Emperor of the West, a Council was assembled by *Basilius* the Emperor, against *Photius* the Patriarch of *Constantinople*; in which Council he was deposed and excommunicated, and the Books he wrote against the Bishop of *Rome*'s Supremacy above other Bishops, commanded to be burnt. At this Council the Embassadors of Pope *Adrian* the second were present, and great endeavours used to have all things therein framed to his content. In this Council the *Worshipping of Images* was again allowed; And it was commanded,

That

That the Image of *Christ* should be held in no less reverence than the Books of the Gospel.

At *Acciniacum* in *France* a Council consisting of Ten Bishops was convened by *Carolus Calvus*. In this Council *Hincmarus* Bishop of *Laudunum* was deprived of his Office, and his eyes thrust out; but Pope *John* the 9th under the Reign of *Carolus Crassus*, restor'd him to his Office, because he appealed from his own Bishop and a Synod in his own Country, to the Chair of *Rome*.

At *Strasbourg*, in the year, 899. and in the Eighth year of the Emperor *Arnulphus*, 22 Bishops of *Germany* were Assembled. Many of the Constitutions of this Synod (according to *Caranza*) are in effect the same with the Canons of former Councils. In the 46th Canon of this Synod it is Ordained, That a Man, whose Wife is Divorced from him by reason of her Adultery, shall not marry again during her life.

At *Ravenna*, in the year, 903, a Council of 74 Bishops was convened, whereat was present *Carolus Simplex*, King of *France*. In this Council the Acts of Pope *Formosus* had allowance, and the Decrees of *Stephanus* the 6th were condemned and burnt.

At *Rhemes* under the said *Carolus Simplex* a Council was assembled for correcting the Abuses of Church-Rents, a great part whereof under pretence of the Kings necessary occasions, was converted by some Courtiers to their own use, against which *Fulco* Archbishop of *Rhemes* declaring his mind freely in Council, was slain by *Vinemar* one of the Oppressors at Court; the like not having been known since the Second Council of *Ephesus*, called a Council of *Briggandry*, wherein *Flavianus* Bishop of *Constantinople* was slain.

At *Rome*, in the time of *Orbo* the First, a great Council was assembled against Pope *John* the 13th, or as others affirm, Pope *John* the 12th. In this Council the Pope was accused of Ordaining a Deacon in a Stable, of *Simony*, of *Adultery*, of making the Sacred Palace like a Bawdy-house, of murdering *Benedict* his Spiritual Father, of Gelding *John* an Archdeacon, of raising Fire, of drinking to the Devil, of distributing the golden Crosses and *Ebalices* to his Harlots, of imploring help from *Jupiter* and *Venus* in his playing at Dice, and of his not Signing himself with the sign of the Cross.

At *Canterbury*, in the year, 975. a Council was Assembled, when *Dunstanus* was Bishop thereof. The Question that was most in debate at this Council, was concerning Marriage in relation to such Persons as were in Spiritual Orders, the which *Dunstanus* (whether his *Crucifix* spake True or False, if it spake at all) declared his Judgment against.

U u u u

At

At Constantinople.

At Constantinople under the Reign of Nicephorus Phocas Emperor of the East was a Council convened, by reason of Nicephorus his taking to Wife Theophania the Relict of his Predecessor Romanus, having been Witness in Baptism to Theophania's Children; the which so displeased Polyeuchus Patriarch of Constantinople, that for the same he, debarr'd the said Emperor from Holy things, and so in effect Excommunicated the Emperor of the East.

At Rhemes, An. 992.

At Rhemes, An. 992. in the Ninth year of the Emperor Otto, and in the Fourth of Hugo Capeto King of France, a Council was convened against Arnulphus Bishop of Rhemes for countenancing Duke Charles, who claimed the Crown as next Heir, being Brother to Lotharius. Whereupon Arnulphus was deposed, and denuded of his Episcopal Dignity, who yet afterwards restored to it again by another Council at Rhemes, called by Pope John the Thirteenth.

At Arles, An. 1026.

At Arles, in the year, 1026. and under the Reign of the Emperor Henry the Second, a Council was assembled in order to the appealing of the wrath of God and his Indignation at that time manifested against the greatest part of the whole World.

At Halingnustat, An. 1023.

At Halingnustat, in the year, 1023. under the Emperor Henry the Second a Council was assembled, wherein great endeavours were used to make a conformity and unity in observation of Ecclesiastical Rites and Ceremonies in Germany, wherein Laws were made concerning the degrees of Consanguinity.

At Tribur, An. 1030.

At Tribur, An. 1030. under the Reign of the Emperor Conrad the Second a Council was assembled, at which the Emperor was present, wherein were made some Constitutions concerning Fasting.

At Sutrium, An. 1046.

At Sutrium in Italy, An. 1046. under the Reign of the Emperor Henry the Third was an Assembly by the Emperor for the pacifying that grand Schism in the Roman Church, when Three Popes at once contended for the Popedom, viz. Benedict the Ninth, Silvester the Third, and Gregory the Sixth, all which the Emperor and the Council dis-Poped, and chose one Sindigerus Bishop of Bamberg to be Pope, whom they called Clemens the Second.

At Rome, An. 1050.

At Rome, about the year, 1050. Leo the Ninth assembled a Council at Rome against Berengarius Deacon at Angiers, who disapproved the Opinion of Transubstantiation, viz. [That after the words of Consecration the substance of Bread vanished, and the substance of the Body and Blood of Christ was in the Sacrament, under the Accidents of Bread and Wine;] whose Letters touching this matter, not finding Lanfrankus Bishop of Canterbury (to whom they

they were directed) in *Normandy*, were delivered to some of the Clergy, who opening the same, sent them to Pope *Leo* the Ninth, whereupon this Council at *Rome* was assembled, wherein the said Letters of *Berengarius* being read, they condemned him (though absent) as an Heretick.

At *Vercellus* the same year *Leo* the Ninth assembled another Council against *Berengarius*.

At *Tours*, in the year, 1055. Pope *Victor* the Second assembled a Council against *Berengarius*, who there answered, That he adhered to no particular Opinion of his own, but followed the common Doctrine of the Universal Church.

At *Rome*, in the year, 1059. Pope *Nicholaus* the Second assembled a Council of 113 Bishops against *Berengarius*, who submitting himself to the Pope and Councils correction, they prescribed him a Form of Renunciation of his Error, so there called, which he accepted, and recanted, yet afterwards published a Refutation of the same Doctrine. In this Council it was Ordained, That the Election of the Pope should belong to the Colledge of Cardinals.

At *Millan*, An. 1060. Pope *Nicholaus* the Second by *Petrus Damianus* held a Council, wherein the Two chief Points debated were touching *Simony*, and the Error of the *Nicholaitans*, whereof they counted such Priests guilty as had married Wives, though they did not (as the *Nicholaitans*) make them common.

At *Mantua*, An. 1066. the Emperor *Henry* the Fourth assembled a Council for pacifying the Differences in the *Roman* Church, between *Alexander* the Second, and *Candalus*, called *Honorius* the Second, wherein *Alexander* was declared Pope, and *Candalus* pardoned.

At *Winchester* Pope *Alexander* the Second by two Cardinals sent into *England*, Assembled a Council to appease the Troubles of the Church in this Kingdom; wherein they deposed certain Bishops and Abbots, among whom *Stigandus* Bishop of *Canterbury*, because he had possessed that Chair, *Robert* Archbishop thereof being then alive, and because he possessed another Bishoprick with it, viz. the Bishoprick of *Winchester*.

At *Friburgh* (anciently called *Tributia*) the Bishops of *Germany* assembled themselves in a Council, in which they declared the Archbishop of *Bremen* to be an enemy to their Country, except he delivered up the young Emperor *Henry* the Fourth, to be educated according to the Covenant made between the Princes and Bishops of *Germany* during his Minority.

At *Vercellis*,
An. 1050.

At *Tours*,
An. 1055.

At *Rome*,
An. 1059.

At *Millan*,
An. 1060.

At *Mantua*,
An. 1066.

At *Winchester*.

At *Friburgh*,
or *Tributia*.

At Mentz,
An. 1069.

At *Mentz*, An. 1069. a Council was Assembled in order to a Divorce of the Emperor *Henry 4th* from his Wife, from which he was dissuaded by the Arguments of *Petrus Damianus* the Popes Nuntio for that purpose.

At Erfurd,
An. 1074.

At *Erfurd*, An. 1074. the Bishop of *Mentz* assembled a Council, in order to an observance of a Command from Pope *Gregory 7th*, touching a separation of the Priests within the Bishoprick of *Mentz* from their Wives, or else to depose them from their Offices. By reason whereof, as also by reason of the Bishops exaction of Tithes from *Turingia*, this Council rose in a tumult and great confusion *re infecta*.

At Mentz,
An. 1075.

At *Mentz*, An. 1075. the Bishop thereof (being commanded by Pope *Gregory 7th* to separate the Priests from their Wives) convened a Synod: but the married Priests so terrified the Bishop of *Mentz*, and the Bishop of *Chun* the Popes Nuncio, that this Council also, as the former, was dissolved, and nothing done.

At Worms.

At *Worms* the Emperor assembled all the Bishops of his Kingdom, in order to a deposing of Pope *Gregory 7th*, otherwise called *Hildebrand*, accused of Perjury, Ambition, Avarice and Pride. The determination of this Council was, That he should be removed from the Popedom, which was subscribed by all Bishops present at the Council.

At Friburgh,
An. 1076.

At *Friburgh*, An. 1076. another Council was assembled, wherein the Princes of *Saxony* and *Sweue* appeared in favour of the See of *Rome* against the Emperor *Henry* the Fourth.

At Rome.

At *Rome* by order of the Pope a Council was assembled in *Lent*, wherein the Emperor *Henry 4th* was not only Anathematiz'd, but also denuded (as far as in them lay) of his Imperial Dignity.

At Brixia,
An. 1080.

At *Brixia*, in the year, 1080. the Emperor *Henry 4th* assembled 30 Bishops of *Germany* and *Italy*, together with many Princes of the Empire: All which consented, That *Hildebrand* should be deposed from the Popedom, and *Gilbertus* Bishop of *Ravenna* placed in his room.

At Rome,
An. 1081.

At *Rome*, An. 1081. the Emperor *Henry 4th*, with the Advice of the *Roman* Senate, appointed a Council to be assembled, wherein *Hildebrand* was deposed, and *Gilbertus*, otherwise *Wigbertus*, to succeed in the Papacy. This Council was called by the said Emperor, soon after he had besieged and taken the City of *Rome*.

At Beneventum.

At *Beneventum* a Council was Assembled by Pope *Victor* the Third, who before his Election to the Papacy was named *Desiderius*, Abbot in *Cassinate*, chosen by the *Romans*, not regarding *Gilbertus* whom the Emperor had made Pope. In this Council *Victor* the Third Anathematiz'd *Gilbertus* Bishop of *Ravenna*.

At

At *Clermont* in *Overnie* of *France*, in the year, 1095. *Urbanus* the Second convened a great Assembly, wherein it was Ordained, That an Army should be raised for support of the distressed Christians in *Jerusalem*, and recovery of the Holy Land out of the hands of the Infidels: The which was likewise Ordained in the Council of *Placentia*, and other Councils of the lesser concern here omitted for Brevities sake. In the next, viz. the 12th Century, there were above 115 Councils: To instance in the most material of them may suffice for this Abridgment.

At *Clermont*,
An. 1095.

At *Paris* *Urbanus* the Second, at the complaint of *Alexius* Emperor of *Constantinople* against the rage of the *Turks*, assembled a Council of most Nations, and was present himself thereat. In this Council were appointed 100000 Men out of the Western Kingdoms for the Holy Land.

At *Paris* the
12th Century.

At *Florence* Pope *Paschalis* the Second convened a Council, wherein the Bishop of *Florence* was called to an account for Preaching openly, That *Antichrist* was already come; for which he was sharply rebuked, and commanded, That for time to come he should utter no such Doctrine.

In *Florence*,
An. 1110.

At *London*, in the year, 1102. in the Third year of the Reign of *Hen. 1.* King of *England*, *Anselmus* Archbishop of *Canterbury* assembled a Council for prohibiting the Marriages of Priests; and the year following was constrained to convene another Council at *St. Pauls* in *London*, to make Constitutions for the punishment of such as defiled themselves with Sodomitical Lust.

At *London*,
An. 1102.

At *Mentz*, An. 1106. a great Council was assembled against the Emperor *Henry 4th*, whom they condemned of Heresie, which was *Simony*, because he would not resign the right of Investiture of Bishops into the Popes hands, and having Excommunicated him took off his Imperial Crown.

At *Mentz*,
An. 1106.

At *Troyes* in *France*, in the year, 1107. Pope *Paschalis* the Second convened a Council, which treated concerning the Investiture of Bishops, not to be in the Power of Lay persons.

At *Troyes*,
An. 1107.

At *Triburia* in *Friburgh*, in the year, 1119. the Bishops of *Germany* assembled concerning the Investiture of Bishops, and in opposition to the Emperor *Henry* the Fifth.

At *Triburia*,
An. 1119.

At *Senon* a Council was called against *Abelardus* by reason of his Heresie: He was also accounted an Heretick in the Council of *Soysson*.

At *Senon*.

The first Four *Lateran* Councils are comprehended under one and the same Title, as more favouring the *Roman* Dissentions, than the Doctrine and Discipline of the Church: The first under *Henry* the Fifth, and *Calixtus* the Second, which had 300 (or according to *Bellarmino*, 900) Bishops, and 22 Canons. In this Council *Burdinus* the

1. *Lateran*,
An. 1123.

the Anti-Pope was laid aside, the Vestures with the Ring and Staff were taken from the Emperor and given to the Pope; who absolved the Emperor and gave him Power of electing German Bishops. In this Council there were appointed *Crosses* for the *Sarazene* War, by means whereof Pardon of Sins might be granted to them that undertook that War, and to their Families.

2. *Lateran*,
An. 1131.

The Second *Lateran* Council was under *Lotbarius* the Emperor, and *Innocentius* the Second, which increased to the number of about 2000 Bishops. This Council omitted Thirty Canons lately published by *Gratian* from the *Vatican* Library, which *Bellarmino* is said to reject: It discharged *Peter* usurping the *Roman* See after *Leo*, under the name of *Anacletus* the Second; branded for Hereticks *Peter* of *Bruis*, and *Arnaldus* of *Brixia* the Disciple of *Peter Abulard*, who rejected Pedobaptism, Church-buildings, and the Adoration of the Cross: It proclaimed these Lay-persons to be Sacrilegious, and incur the danger of eternal damnation, who receive Tithes; and deprived Usurers of Christian Burial, and cursed them to Hell.

3. *Lateran*.

The Third *Lateran* Council was under *Frederick* the First and *Alexander* the Third, by an Assembly of 30 Bishops, who made up the difference between this *Alexander*, and one *Ottavianus* and his Successors *Gindon* and *John*, a German taking up the quarrel with him; which Dissentions divided *Europe* into Parties. Also the *Albigenses* under the name of *Cathari*, *Publicans* & *Paterini*, taking their Rise from the *Waldenses*, were here condemned; *Lombard*, who affirmed that Christ according to his Manhood was nothing, was censured; Ordinations made by Schismatics wholly abrogated, Private Oratories and Priests for Leprous Persons appointed, and the manner of Visitations by Archbishops, Bishops, and Deacons prescribed.

4. *Lateran*.

The Fourth *Lateran* Council was under *Frederick* the Second, and *Innocentius* the Third, with 400 Bishops and 80 other Fathers. This Council rejected the Book of *Joachim* the Abbot against *P. Lombard*, established Transubstantiation, Auricular Confession, and the Papal Absolution of Subjects from their Allegiance: It exacted an Oath from Secular Magistrates to expel Hereticks nominated by the Pope. This Council by Indulgencies encouraged those that went with Crosses for recovery of the *Holy Land* under *Godfrey* of *Bulloigne*; prohibited Plurality of Benefices, and Sale of Reliques.

At *Papia*,
An. 1160.

At *Papia*, in the year, 1160. the Emperor *Frederick* the First convened a Council, occasioned by the difference between *Alexander* the Third, and *Victor* the 4th, for the Popedom after the death of *Adrian* the Fourth. In this Council *Victor* the Fourth was declared Pope. Whereupon *Alexander* the Third convened a Council at *Clere-*
mont,

mont, in which he Cursed the Emperor, Pope *Victor*, and their Adherents.

At *Rome*, in the year, 1180. a Council of 180 Bishops was convened by the Popes Authority. Their Consultations and Canons were touching the form of Electing Popes for the future; also touching Ecclesiastical Dignities and Discipline, touching Excommunication, Residence, Continency, Plurality, Patronage, Presentations, Festivals, Usurers, *Jews* and *Zarazens*, and the like.

At *Rome*,
An. 1180.

At *Rome*, in the year, 1215. Pope *Innocentius* the Third convened a General Council, wherein the Doctrine of Transubstantiation was ratified. This was another of the *Lateran* Councils.

At *Rome*,
An. 1215.

At *Lions* Two Councils, the First called by *Frederick* the Second, and *Innocentius* the Fourth, about the year, 1244. In this Council the Emperor that deserved so well of the Christian Church against the Infidels, was after four Excommunications deposed by the Pope, prohibiting that any should name him *Emperor*: Being thus Deposed, he defends his Right by his *Gibelines* against the *Guelphes* of the Papal Party. In this Council appears no other President than the Pope himself, who with 140 Bishops and Abbots endeavoured under colour of recovering the Holy Land, by the Fifts of the Church to redeem the *East*. By this Council new Festivals were instituted for the Canonizing of *Roman* Saints. The Seventeen Institutions ascribed to this Council, are said to be rather Political and Polemical than Ecclesiastical, and (according to *Bellarmino*) are to be found in the Sixth of the *Decretals*.

1. At *Lions*,
An. 1244.

At *Lions* the other of these Two Councils was under *Rodolphus* the First at *Hasspurg*, procured by *Gregory* the Tenth, consisting of at least Seven hundred Bishops: In this Council was present *Michael Palaeologus* the Greek Emperor. *Aquinas* sent for to this Council, dies in his way thither, where *Bonaventure*, after his being created Cardinal, died also. In this Council the Pope in behalf of the Holy Land requires a Subsidy, the Tenth of all Ecclesiastical Rights for the space of Six years. In this Council also it was ordered, That there should be bowing at the Name of *JESUS*. There were 31 Constitutions or Canons made by this Council, which though omitted by the *Summulists*, may yet be found in the Sixth of the *Decretals*.

2. At *Lions*.

At *Vienna*, in the year, 1311. under *Henry* the Seventh, *Clement* the Fifth being Pope, a General Council of above Three hundred Bishops was convened. In this Council was set forth a Book of Papal Decrees, called *Liber Clementiarum*, which was ratified by this Council. In this Council also it was, that *Corpus Christi* Day was Ordained to be a Festival, and the Order of *Templers*

At *Vienna*,
An. 1311.

to

Antonin. Hist.
par. 3. tit. 11. 3.

to be quite abolished; for the *Jerusalem*-Expedition being strongly urged in this Council, the *Templers* are removed out of the way for murdering of the *Abissins* Ambassador, and other Impieties and Heresies. Whether *Tribemius* did hit the mark or not, it matters not; Notorious it is, That the *Templers* were very Rich, but if that were a sufficient pretence for Heresie and Expulsion (as some conceive) then there would be no such thing as the Church of *Rome*, at least not Orthodox. In this Council the Clergy are permitted to take an Oath of Allegiance, not of Subjection to Lay-Magistrates; also *Peter John*, the *Dulcimists*, the *Fratricelli*, the *Begwards* and *Begwins*, together with the *Lollards* were condemned. *Peter John* was condemned for denying the Soul to be the form of Man; a new piece of Heresie against Natural-Philosophy. The Constitutions of this Council under the name of *Clementine*, are extant in five Books for a Supplement of the Canon Law; in which is that famous Decree of Constituting *Professors* to be maintained by a competent Stipend at the Court of *Rome*, at the Universities of *Paris*, *Oxford*, *Bononia*, and *Salamanca*, for the instructing in the *Hebrew*, *Arabic* and *Chaldee* Languages, whereby the *Jews* and *Mahumetans* might the more easily be converted to the Faith.

Clem. 1. 5. tit. 1.
Gal. 1. 7.

5. Lateran,
An. 1311.
Vid. Prideaux
his Synops. of
Councils.
Edit. 5. Oxon.

The Fifth *Lateran* Council, in the year, 1311, under *Maximilian* the Emperor, Pope *Julius* II. President thereof. It is supposed this Council was called for dissannulling another at *Pisa*, where some Cardinals were met against the Pope. There were convened at this Council 114 Bishops, and it had Twelve Sessions, Five whereof were under *Julius*, the other Seven were finished by *Leo* the Tenth. *Suarez*, *Cajetan*, and *Navarr* profess this to be a rejected Council. The pragmatical Decree made at the Council of *Basil*, in defence of Ecclesiastical Liberty against Popish Usurpations, is here discussed and exploded. The Immortality of the Soul is here also defended, concerning which many at that time doubted it, others wantonly disputed it, and others heretically denied it. By this Council a restraint is laid on such as in Preaching wrest the Scriptures at their pleasure to uphold and disperse some strange Opinions; which restraint extended also to the impression of Books not Orthodox, nor Licensed as such.

1. At Pisa,
An. 1409.

At *Pisa*, in the year, 1409. was (as some call it) a General Council, consisting of Twenty three Cardinals, Three Patriarchs, three hundred Archbishops and Bishops, Twenty eight Governors of Monasteries, and a very great number of Divines, and Ambassadors of Princes. The great Dissention between *Benedict* the Twelfth, and *Gregory* the Thirteenth was the occasion of this great and First Council at *Pisa*. Both which having been Summoned, are Deposed by this Council, and *Alexander* the Eighth placed in

in *St. Peters* Chair, which yet removed not the said Dissention; notwithstanding *Alexander* thus elected, is reckoned in the Catalogue of the Popes. There were twenty three Sessions of this Council, the Acts thereof Printed at *Paris* An. 1612. are extant. They that conceive this to be a Headless Council (as *Antonius* and others) because called in a Tumult by the Cardinals, without the Popes Authority, do not consider that at this time the Head was troubled with a double Impostume, and could not be consulted in the case.

3 Part. Tk. 22.
c. 5. sect. 2, 3.

At *Pisa* the second Council was called by *Maximilian* the Emperor, and *Lewis* the French King, against Pope *Julius* the second, who (it seems) had obliged himself by an Oath to have a General Council within two years next after his Election to the Popedom; but this not being performed, some of the more eminent Cardinals, under the protection of the said Emperor and French Kings, meet at *Pisa*, and Summon the Pope to make his appearance there; instead whereof he Excommunicates them, the French King and all; the Emperor himself scarce escaping that Thunderbolt, and calls a *Lutheran* Anti-Synod at *Rome*, before whom he excuses his Oath, clears himself, and dies. *Leo* the tenth succeeds, continues the Council, and ratifies many Decrees; whereupon the *Pisan* Cardinals upon their Submission are restored to their former dignity.

2. At *Pisa*.

At *Constance* in the year 1414. a Council with great difficulty was convened by the Emperor *Sigismund* and Pope *John* the twenty third, consisting of about a thousand Bishops and Doctors, for the removing of the *Popish Schisms* out of the Western parts, and pacifying the Difference which happened between Three Popes, all striving for the Popedom, viz. Pope *John*, whom the *Italians* set up; Pope *Gregory*, whom the *French* set up; and *Benedict*, whom the *Spaniards* set up. This Council continued four years, in which all the said three Popes were deposed, and *Martin* elected Pope. Others relate it somewhat otherwise; As if after *Gregory* the eleventh, some Cardinals exalted *Urban* the sixth, Others *Clement* the sixth. The Nations are divided into parties, our *English* (as reported) with the *French* and *Spaniards* adhering to *Clement*; but *Urban* dying at *Rome*, *Boniface* the ninth supplies his place, but *Angelus* a certain *Venetian* succeeds him under the Title of *Gregory* the twelfth. *Clement* also being removed, had for his Successor *Peter de Luna* a *Spaniard*, under the name of *Benedict* the thirteenth. To quench this Flame the Cardinals and Bishops meet at *Pisa*, where they exalt one of *Cret* unto the Papal dignity, under the Title of *Alexander* the fifth, who sickening suddenly by an intoxicating Clyster, was succeeded by *John* the 23d by Election of the *Pisan* Cardinals, who by the persuasion of the

At *Constance*,
An. 1414.

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said

said Emperor *Sigismund* called this Council at *Constance*, and being present at the same, was first accused of many Crimes; then deposed, and *Martin* the fifth exalted by the Council to the Papal dignity. There were 45 Sessions of this Council, in the 8th whereof the Doctrine of *John Wickliffe* was condemned, and his Bones ordered to be taken out of his Sepulcher and burnt. In the 13th Session thereof it was ordained, That no Priest under pain of Excommunication, should communicate unto the People under both kinds of Bread and Wine. In the 15th Session the Sentence of Condemnation of *John Husse* was read and published, and himself delivered to the Secular Power to be burnt. In the 21 Session, the Sentence of Condemnation was pronounced against *Jerome of Prague*, who was also delivered to the Secular Power to be burnt. In this Council it was concluded, That the Council is above the Pope; and that an Engagement with an Heretick is not to be kept.

At *Basil*,
AD. 1431.

At *Basil* in the year 1431. was a General Council assembled, procured by *Sigismund* the Emperor, of Pope *Martin* the fifth, and afterwards of *Eugenius* the fourth, in which, Cardinal *Julian of Arclatum* was President, and which continued nigh 18 years. This Council had 45 Sessions, and therein it was also concluded (as in that of *Constance*,) That the General Council is above the Pope, and that all persons ought to be subject to the General Council, as Children are subject to the Authority of their Mother. Pope *Eugenius* confirmed this Council by his Apostolical Letters, whom notwithstanding this Council deposed, and in his room chose *Amedeus* Duke of *Savoy* to be Pope, whom they called *Felix* the 5th. For this Pope *Eugenius* the fourth, being cited and not appearing, was deposed for his Contempt, and the said *Amedeus* Duke of *Sabaudia*, who lived an Hermites life in the Mountains of *Ripalia*, by the Cardinals is exalted to the Popedom, and stiled *Felix* the fifth. Besides the declaring here, That the Council is above the Pope: It was also confirmed, That the Pope cannot dissolve, prolong or remove the Council, being lawfully called. Yet after this the said *Eugenius* constituted an Anti-Synod at *Ferraria*, which afterwards removed to *Florence*, where he acted with the *Greeks*, the Emperor being present. They of *Basil* mean while confirmed the pragmatical Decree, condemned Popish Bastardy, suppressed Concubines, and ordered how the *Jews* might be brought to Christianity. They declared also the *Blessed Virgin* to be free from the contagion of every Sin, indulged to the Lay-*Bobemians* the use of the Cup in the *Eucharist*, and by reason of a raging Pestilence betake themselves from *Basil* to *Lausanna*, where the Emperor *Frederick* perswaded Duke *Amedeus* to renounce the felicity of Pope *Felix*.

At

At *Florence* in the year 1431, a Council contrary to that at *Basil*, At *Florence*,
An. 1431. yet sitting and undissolved, was held by Pope *Eugenius*, in which Council the Emperor and Patriarch of *Constantinople* with many others, of the *Greek Church* were present, and were prevailed with to yield to many points of the *Roman Church*, but could never be prevailed with to believe their Doctrine of Transubstantiation. This *Florentine Council* began at *Ferraria*, under *Albericus* Emperor, and *Eugenius* the fourth, whence by reason of a Pestilence it did remove to *Florence*, and was there finished. In this Council were 141 Bishops, the Pope himself President, who deposed the Council of *Basil* at the same time by the *Germans*. There were present at this Council *John Palaeologus*, with the Patriarch *Joseph*, and the *Greek Doctors*. In this Council were debated certain Articles concerning the Proceeding of the Holy Ghost, with the Addition to the *Nicene Creed* [and from the Son,] Purgatory, the Power of Suffrages, and Sacrifice to the Dead, Transubstantiation, the Administring unleavened Bread in the *Eucharist*, but especially the Popes Supremacy.

At *Trent* in the year 1546. was a Council held under *Charles* At *Trent*,
An. 1546. the fifth and *Ferdinand* the tenth, *Paul* the third, *Julius* the third, *Pius* the fourth, *Marcellus*, and *Paulus* the fourth; for this Council continued no less than eighteen years: At the first Meeting whereof were seven Sessions in the two first years thereof. The second Meeting was in the time of Pope *Julius* the third, An. 1551. which had only three Sessions, by reason of Wars happening in *Germany*: At this second Meeting the *French King* protested against this Council. The third Meeting whereof was nine years after the second, it being appointed by Pope *Pius* the fourth; there having been in this interval, since the second Meeting, when *Julius* the third was Pope, two other Popes, viz. *Marcellus* and *Paulus* the fourth. At this third and last Meeting there were nine Sessions, the last whereof began the third of *December*, An. 1563. The chief points treated of at this Council were concerning the Scriptures, Original Sin, Justification, the Sacraments in general, Baptism, the removing of the Council, the *Eucharist*, Repentance, Extreame Unction, Communion of Lay-persons under one kind, the Sacrifice of Mass, the Sacrament of Order, Matrimony, Purgatory, worshipping of Reliques, Invocation of Saints, Worshipping of Images, Indulgencies, the choice of Meats, Fastings, and Festivals. The History of this Council of *Trent* is extant.

Of *National Councils* there have been many more than what are before-mentioned, as here in *Britain*, and in *Italy*, *Spain*, *France*, *Germany*, the *Eastern* and *African*. In *Italy* it is said, that there are to be found 115 such Synods, as it were *National*, which go under the Name of *Roman Councils*. But such as are of the most Remark in each of these Countrys, and the principal things they determined, you may find a touch of (and no more) in the Learned Bishop *Prideaux's Synopsis of Councils*, in the 8th Chapter, Edit. 5. Oxon. 1672.

G. H. A. P. XLII.

Of Excommunication.

1. *What Excommunication is: It is Twofold.*
2. *By what Appellations the Greater and Lesser Excommunications are known and distinguished; their respective derivations and significations, and the nature of each.*
3. *Ecclesiastical Censures in the general may be Threefold.*
4. *What the Law intends by Excommunication ipso facto.*
5. *What the Excommunicate is not debarred of by Law.*
6. *Legal Requisites to the due pronounciation of the Sentence of Excommunication.*
7. *What course the Law takes with an Excommunicate, after forty days so persisting obstinate.*
8. *The several Causes of Excommunication ipso facto, enumerated by Lindwood.*
9. *The Causes of Excommunication ipso facto, by the Canons now in force in the Church of England.*
10. *The several Writts at Law touching persons Excommunicate, and the Causes to be contained in a Significavit, whereon the Excommunication proceeded.*
11. *What the Writts de Excommunicato Deliberando, also de Excommunicato Recipiendo do signifie in Law.*
12. *A sufficient and lawful Addition to be in the Significavit, and in the Excom. Capiend. Vid. Sect. 10.*
13. *Several Statutes touching Persons Excommunicated.*
14. *Excommunication for striking in the Church.*
15. *Whether a Bishop hath Jurisdiction, or may Cite a Man out of his Diocesi.*
16. *What are the Requisites of a Certificate of Excommunication for stay of Actions, and how it ought to be qualified.*
17. *A Significavit of Excommunication for not answering Articles, not shewing what they were, not good.*
18. *By whom an Excommunication may be certified, and how.*
19. *In what Case the Significavit of an Excommunication ought to express one of the Causes mentioned in the Statute.*
20. *Whether a General Pardon doth discharge an Excommunication for Contempt precedent to the Pardon, or shall discharge the Costs of Court thereon.*

21. *A Man taken upon an Excom. Cap. and discharged, because the Significavit did not express the party to be Commorant within the Bishops Diocese at the time of the Excommunication.*
22. *Where a Man is twice Excommunicated, whether an Absolution for the later shall purge the first Excommunication.*
23. *Whether a Prohibition lies to the Ecclesiastical Court, upon Costs there given, not in an Action at the suit of the party, but upon an Information there exhibited.*
24. *What remedy in Law for a party wrongfully Excommunicated, and so remaining forty days, without suing a Prohibition.*
25. *Whether a Person taken by a Capias de Excom. Capiend. be Bailable or not; And whether the Bishop may take Bond of the Excommunicate to perform Submission for their Absolution.*

An. 23 H. 8. c. 3.

(Y.) **E**Xcommunication, commonly termed in the Common Law, in the Law-French thereof, *Excommuniement*, is a Censure of the Church, pronounced and inflicted by the Canon or some Ecclesiastical Judge lawfully Constituted, whereby the party against whom it is so pronounced, is *pro tempore* deprived of the lawful participation and Communion of the Sacraments. And is also sometimes (as to Offenders) a deprivation of their Communion, and sequestration of their Persons from the converse and society of the Faithful. And therefore it is distinguished into the Greater and Lesser Excommunication; the Greater comprizing as well the later as the former part of the abovesaid definition or description; the Lesser comprizing only the former part thereof. *De Except. c. a nobis. Lindw. de Cohab. Cler. gl. in verb. Sacramenta. Excommunicatio, quasi, extra Communionem.* For Excommunication is, *Extra Communionem Ecclesie separatio; vel Conscriptura Ecclesiastica excludens aliquem a Communione Fidelium* (a). This Ecclesiastical Censure, when it is just, is not by any means to be despised or opposed; for Christ himself is the Author thereof (b). Anciently among the Hebrews, such persons as were Excommunicated were termed *Aposynagogi*, as being *quasi Synagoga exacti*, and to be shun'd or avoided of all Men until they repented. That of our Saviour in *Matth. 18. 17.* [*Let him be unto thee as an Heathen Man, and a Publican*] seems to refer to some such Excommunication; the power whereof by way of Judicature being then in the Jewish *Sanhedrim*, or Colledge of Elders.

(a) 11 quest.
3. cap. nihil in
Jur. Can.

(b) Mat. 18. 17.
1 Cor. 5. 9. 11.
2 Thess. 3. 14.

(2.) This

(2.) This Ecclesiastical Censure when limited or restrained only to the *Lesser Excommunication*, the *Theologian* will have to be understood by the Greek word *Anathema*, Accursed or Separated; and when it extends to the *Greater Excommunication*, then to be understood by the *Syriack* word *Maran-atba*, or [Our Lord cometh]. *Anathema Maran-atba*. [*Anathema*] Let him be accursed, qualified Devoted to the Devil, and separated from Christ and the Church's Communion: [*Maran-atba*] Some take this for a *Syriack* word (c). Others, not so well satisfied with that Judgment, will have it to be a *Chaldee* word, yet used in the *Hebrew*, and familiarly known among the *Greeks* (d). [*Maran-atba*] viz. [Our Lord cometh], for *Maran* is, Our Lord, and *atba*, cometh; or rather three words more properly, viz. *Marana-atba*, Our Lord cometh. Being a word used in the greatest Excommunication among the Christians, intimating or implying, That they summoned the person Excommunicated before the dreadful Tribunal at the last coming of the Son of God, or that such as were under this censure of the Church, were given up and reserved to the Lords coming, to be judged by him; and mean while (without Repentance and Absolution) are to expect nothing, but the terrible coming of Christ to take Vengeance of them. To which that Prophecy of *Ezekiel* seems to allude, Behold, the Lord cometh with ten thousands of his Saints, to execute Judgment upon all, &c. The Venerable Mr. Bede doth suppose, that this answers to the heaviest Curse among the Jews for they had (1) their [*Nidui*] (2) their [*Cherem*] that is, *Anathema*. This their *Cherem*, was either the simple and single *Anathema*, or their *Shematha* or *Mayanatha*. For this dreadful kind of Excommunication, here called *Maran-atba*, the Jews called *Samatha*; *Sem* signifying the name of God *Tetragrammaton*, or *Jehovah*, and *atba*, he cometh; though others will have that *Samatha* to be derived from [*Sam*], that is [*their*], and [*Misha*] that is [*death*], *Their death*. But not to insist further on the words wherein by this Ecclesiastical censure of Excommunication is signified; for that is but as a Flash of Lightning, in respect of the Thunder of the Curse it self.

(3.) Although every Excommunication is an Ecclesiastical Censure, yet every Ecclesiastical Censure is not an Excommunication; for an Ecclesiastical Censure may be as well *per Suspensionem*, and *per Interdictum*, as *per Excommunicationem*. Extr. de verbis sig. con. querenti. Hanc autem Censuram fulminare possunt Eccles. Prælati, quibus ab homine, Lege, vel Canone, aut Consuetudine tribuitur Jurisdictio Ordinaria. De Offic. Ord. c. cum ab Ecclesiis.

Rom. p. 3.
Gal. 1. 8.
1 Cor. 16. 22.

(c) Beza. Annot.
in 1 Cor. 16. 22

(d) Calv. Com.
Ibid. & Buxtorf.
Lexic.

Excommunicated may be Excommunicated again, either for the same or some other new Cause. *Ibid. & 3. q. 4. engelstradam.* And although the first Excommunication is in effect sufficient for the ejecting such an one out of the Church, so that he who is once cast out of the Church, *amplius excludi non potest*; yet by this second Denunciation there follows another effect, and that is, That thereby he may be reputed and held by all the Faithful in all places, as a person utterly shut out of the Church, *donec per suum Iudicem secundum formam Ecclesie fuerit absolutus.* *Gloss. ibid. verbi & denunciantur.*

(7.) Also, when a person Excommunicated hath forty days Old N.B. 34, 35. b. a persisted in his obstinacy contrary to Law under that Sentence; the Bishop may then make his humble Address to the King for the apprehending and imprisoning such obstinate Excommunicates; but this may not be done by any inferior to a Bishop; *Nam ad rogatum prelatorum inferiorum Rex non consuevit scribere pro Captione Excommunicatorum.* *Lindw. de Sententia Excom. c. preterea, gloss. in verb. Prelatorum.* And therefore if a Man be Excommunicated by any inferior to a Bishop, as by a Dean, Archdeacon, or the like, yet the Supplication for his Majesties Writ ought to be by the Bishop of that Diocese, and in his Name; *Nam Inferiores Episcopi non possunt invocare Brachium Seculare.* *Ibid. & Lindw. de Cohab. Cler. & Mul. c. 1. §. & si nec. ver. Brachium Seculare.* And in case the Bishop shall herein refuse to do what the Law requires, he may be constrained thereto by the Archbishop. *Ibid. & de jur. patron. c. nullus.* Nor can the Excommunicated person, who (after forty days persisting in his obstinacy) is upon the Kings Writ (on the *Significavit*) *pro Corp. Excom. Capiendo* apprehended, or like to be apprehended, evade Imprisonment, or defend himself by an Appeal, or by virtue thereof, or by shewing the same to the Temporal Judge, that so under pretence of a dependency of an Appeal he may escape Imprisonment; because such Appeal as to the validity or invalidity thereof, or *teneat vel non teneat, legitima vel non legitima,* falls under the scrutiny and examination, not of the Temporal, but Ecclesiastical Judge; and therefore, *si talis indagatio siue discussio* pertains not to the Secular Judge, it were frivolous to alledge that before one not qualified to examine the merits of the Appeal. *Dist. c. preterea. gloss. in verb. Dari debet.* And as persons Excommunicated cannot legally have any shelter or subterfuge under pretence of such Appeals: so neither do the Canons suffer the Contemners of this Sentence of Excommunication to go unpunished; under which number regularly and generally are computed all such as *animo indurato* do persevere under Excommunication by

the space of forty days; according to the Custom of the Realm of England. *Lindw. de Sententia Excom. c. ut Archidiaconi. gloss. in verb. Contemneres.* But more particularly the Canons hold them Contemners of this Excommunication, who add *Culpam vulpæ*; or go into the Church, albeit Divine Service be not then celebrating, unless it be to hear the Word preached, which being ended, he is immediately to depart; or stand at the Church-door in the time of Divine Service, and hearing the same, albeit he go not within the Church it self; or thrust himself into the company of others, when it is in his power to avoid it; or lastly, when he continues too long secure under such Sentence of Excommunication without repentance, whereby the Law concludes him so manacled by his obstinacy, as no Spiritual Physick can have any operation upon him: And although regularly the Return of such a one is to be expected *usq; ad annum*; yet in this Kingdom (*quoad invocationem Brachii Secularis*) it is sufficient if forty days be expired after his Excommunication. *Ibid. c. 1. auctoritate gloss. in verb. Contemneres.* And whereas we often in the Law meet with certain Cases of Offences, incurring the Sentence of Excommunication *ipso facto*, that is, as aforesaid, *nullo hominis ministerio interveniente*; *Requiritur tamen* even in that case, *Sententia Declaratoria. C. cum secund. Leges. de Hæret. li. 6. & Lindw. de Foro Comp. c. 1. gloss. in verb. Ipso facto.*

(8.) It is therefore not impertinent here to insert, what principally those Offences are, on the Guilty whereof the Law doth inflict this Excommunication *ipso facto*. *Lindwood* tells us, that there are found among the Canons and Constitutions Provincial these Cases following; wherein Excommunication *ipso facto* is incurred; *viz.* (1) A wilful and malicious impeding the execution of the Canon against Incontinency, specially in Ecclesiasticks as to Concubines. (2) A clandestine and surreptitious Proceeding at Law, even to the Writ of Banishment, against an innocent person, and ignorant of the Proceeding. (3) Bigamy. (4) False Accusing of any Innocent Clergy-man before a Temporal Judge, whereby he happens to suffer under the Secular Power. (5) A laying Snare to entrap any in holy Orders; whereby afterwards to charge them falsely before the Secular Powers with Crimes, whereof they were not Guilty. (6) A violation of lawful Sequestrations made by the Bishops, their Vicars general, or principal Officials. (7) The exercise of Ecclesiastical Jurisdiction by any Clerk married, or by any Lay-person, in matters only and properly pertaining to the cognizance of the Church. (8) Disobedience to the *Gregorian* Constitution, forbidding the holding of two Benefices Incompatible *cum Cura animarum* without a Dispen-

Dispensation. (9) A procuring to be presented to a Benefice that is already full of an Incumbent, by vertue of the Writs of *Quare non admittit*, or *Quare Impedit*, or the like. (10) Abettors and Advisors of any to fraudulent Conveyances or Deeds of Gift in *fraudem Ecclesiæ, Regis Creditorum, aut heredum*. (11) All such as hinder any of what quality soever, that are legally Testable, from making their last Wills and Testaments, or afterwards do unjustly obstruct the due execution of the same. (12) All such as hinder the devotion of the people, in making their Offerings and paying their Tithes, converting them to their own use. (13) All such as deny the gathering of the Tithes of any Fruit, or molest and hinder the Collectors thereof. (14) All Laypersons who usurp upon such Oblations and Offerings as are due and appertain only to Ecclesiastical Persons, without their assent and the assent of the Bishop. (15) Sacrilegious Persons, and all such as invade the just Rights, Liberties, or Revenues of the Church, or otherwise unjustly possess themselves *de bonis Ecclesiasticis*. (16) All Bailiffs and other Officers, that unjustly enter upon the Goods of the Church, or unduly exact from the same, or commit Waste upon any the Revenues of a Church vacant. (17) All opposers of Episcopal Authority, or that resist and oppose the exercise of Ecclesiastical Jurisdiction, and all such as dissuade others from their due obedience thereunto. (18) All such as being imprisoned for their contempt to some Ecclesiastical Sentence, are thence set at liberty contrary to the Liberties and Customs of the Church of *England*, being Excommunicate persons when they were first apprehended. (19) All such as violently usurp upon the propriety of such Trees and Fruits as grow in the Church-yards, rooting them up or felling them down, or mowing down the Grass thereof, contrary to the will and without the consent of the Rector, or Vicar of any Church or Chapel, or their Tenants. (20) All such as should *non rite* solemnize prohibited Marriages, that is, such as have any Canonical Impediment. (21) All such as contrary to the true Catholick Sense shall assert any thing, or lay down positions, or make propositions, favouring of Heresie, publicly in the Schools. (22) All such as in their Preaching, or otherwise, shall violate the Canon, that enjoyns a due examination and approbation of persons before they are admitted to Preach the Word of God. (23) All such as touching the Sacraments assert any thing beside or contrary to the determination of the Church, or call such things into doubt publicly, as are defined and stated by the Church. (24) All such as in the Universities do (after a premonition to the contrary) hold any Opinions, or assert any Doctrines, Pro-

positions or Conclusions, touching the Catholick Faith, or good Manners, of an ill tendency, contrary to the determination of the Church. (25) All such Clerks as without Ecclesiastical Authority, shall of themselves or by any Lay-power intrude themselves into the possession of any Parochial Church, or other Ecclesiastical Living, having *Curam animarum*. These Cases, and some others, now not of use in this Realm, are enumerated by *Lindwood*: *Lindw. de Sententia Excom. c. ult. gloss. in verb. Candelis accensis*. But there are very many other Cases in the Canon Law that fall under this Excommunication *ipso facto*, by which in the Law is ever understood the *Major Excommunicatio*, and was wont to be published and denounced in the Church four Solemn days in every year, when the Congregation was likeliest to be most full, and that in *Majorem terrorem*.

(9.) The Causes of Excommunication *ipso facto*, according to the Constitutions and Canons Ecclesiastical of the Church of *England*, now in force, are such as these, *viz.* (1) Impugners of the Kings Supremacy. (2) Affirmers of the Church of *England*, as now established, to be not a true and Apostolical Church. (3) Impugners of the Publick Worship of God, establish'd in the Church. (4) Impugners of the Articles of Religion, established in the Church of *England*. (5) Impugners of the Rites and Ceremonies established in the Church of *England*. (6) Impugners of the Government of the Church by Archbishops, Bishops, &c. (7) Impugners of the Form of making and consecrating Archbishops, Bishops, &c. in the Church of *England*. (8) Authors of Schisms in the Church. (9) Maintainers of Schismatics, Conventicles, and Constitutions made in Conventicles. Likewise by the said Canons, the Ecclesiastical Censure of Excommunication is incurr'd by all such Ministers, as revolt from the Articles unto which they subscribed at their being made Ministers, and do not reform after a Months suspension: Also, by all such persons as refuse the Sacraments at the hands of Unpreaching Ministers, after a Months obstinacy, being first suspended; also, by all such Ministers as without their Ordinaries License under his Hand and Seal, appoint or keep any Solemn Fasts either publicly or in private Houses, having been formerly suspended for the same fault; and finally by all Ministers who hold any private Conventicles, to consult on any thing tending to the impeaching or depraving of the Doctrine of the Church of *England*, or of the Book of Common-Prayer, or of any part of the Government, and Discipline now established in the Church of *England*, which by the seventy third Canon, is Excommunication *ipso facto*.

(10) Touching persons thus Excommunicated, persisting forty days in their obstinacy, there are three several Writs at the Law, issuing from the Secular Power, viz. *Excommunicato Capiendo*: *Excommunicato Deliberando*: *Excommunicato Recipiendo*. The *Excommunicato Capiendo* is a Writ issuing out of Chancery, directed to the Sheriff, for the apprehending and imprisoning of him who hath obstinately stood Excommunicated forty days; for the contempt to the Ecclesiastical Laws, of such not in the *interim* obtaining their Absolution, being by the Ordinary certified or signified into Chancery, the said Writ issues thence for the apprehending and imprisoning them without Bail or Mainprize, until they conform (b). Which Writ, as by the Statute of 5 Eliz. c. 23. is to be awarded out of the High Court of Chancery, so it is to issue thence only in Term time, and returnable in the Kings Bench the Term next after the *Teste* thereof, and to contain at least twenty days between the *Teste* and the Return thereof. And in case the Offender against whom such Writ shall be awarded, shall not therein have a sufficient and lawful Addition, according to the form of the Statute of 1 H. 5. Or if in the *Significavit* it be not contained, That the Excommunication doth proceed upon some cause of Contempt, or some Original matter of Heresie, or refusing to have their Children Baptized, or to receive the Holy Communion, as it is now used in the Church of England, or to come to Divine Service, now commonly used in the said Church, or Error in matters of Religion or Doctrine now received and allowed in the said Church, Incontinency, Usury, Simony, Perjury in the Ecclesiastical Court, or Idolatry: That then all Pains and Forfeitures limited against such persons Excommunicate by the said Statute of 5 Eliz. 23. by reason of such Writ of *Excom. Capiend.* wanting sufficient Addition, or of such *Significavit* wanting all the Causes aforesaid, are void in Law (c).

(b) F.N.B. fol. 61. Stat. 5 Eliz. c. 23. Orig. Reg. Writs, l. 65, 67.

(11) The *Excommunicato Deliberando*, is a Writ to the Under-Sheriff for the releasing and delivery of the Excommunicate person out of Prison, upon Certificate from the Ordinary into the Chancery of his Submission, satisfaction, or conformity to the Ecclesiastical Jurisdiction (d). And the *Excommunicato Recipiendo*, is a Writ whereby Excommunicated persons, who by reason of their obstinacy having been committed to Prison, and thence unduly delivered, before they had given sufficient Caution or Security to obey the Authority of the Church, are to be sought for, and committed again to Prison (e). This Sentence of Excommunication by the 65th Canon pronounced against any, and not absolved within three Months next after, is every sixth Months ensuing.

(c) Di. St. 5. El. 21.

Old N.B. 35. a.

(d) F.N.B. fol. 63. Reg. of Writs, fol. 67.

(e) Reg. of Writs. *ibid.*

ensuing, as well in the Parish Church, as in the Cathedral of the Diocels wherein they remain, by the Minister openly in time of Divine Service upon some Sunday, to be denounced and declared Excommunicate, and where by the 68th Canon Ministers are enjoined not to refuse to Bury, it is with an exception to such persons deceased, as were denounced excommunicated *Majori Excommunicatione*; for some grievous and notorious Crime, and of whose repentance no Man is able to testify (f).

(f) Can. 65, 68. A Sentence was given in the Chancellors Court at Oxford at the Suit of *B.* against *H.* and thereupon *H.* was Excommunicated, and taken in London, upon the Writ of *Excom. Capiendo*. And it came into the Kings Bench, where he pleaded, That there was no Addition in the *Significavit*, according to the Statute of 5 *Eliz.* and thereupon prayed to be discharged. And the Opinion of the Court was, That by the Statute of 5 *Eliz.* the Penalties mentioned in the said Statute are discharged, but not the Imprisonment nor the Excommunication (g).

(g) Hill. 6. Car.
B.R. Hughes
vers. Bndy.
Jones Rep.

(13.) By the Statute of 9 *Ed. 2.* 12. the Writ of *Excom. Capiendo* may be awarded to take a Clerk Excommunicate for Contumacy, after forty days. And by the Statute of 9 *E. 2.* 7. the Kings Letters may not be sent to an Ordinary to absolve an Excommunicate, but where the Kings Liberty is prejudiced. By the Statute of 5 & 6 *Ed. 6. cap. 4.* striking, or laying of violent hands upon any person in a Church or Church-yard, is Excommunication. And by the Statute of 2 *Ed. 6.* 13. it is Excommunication to disobey the Sentence of an Ecclesiastical Judge in Causes of Tithes. By the Statute of 3 *Jac. 4.* the Sheriff may apprehend a Popish Recusant standing Excommunicate; and by the Statute of 3 *Jac. 5.* a Popish Recusant convicted shall stand as a person Excommunicate. And by the Statute of 3 *Ed. 1.* 15. he that is Excommunicated shall be debarred of Mainprize.

(14.) *V.* against *E.* in the Ecclesiastical Court, where the Suit was for striking in the Church, which by the second Branch of the Statute of 5 *Ed. 6. cap. 4.* is Excommunication *ipso facto*. By which he surmized him *incidisse in penam Excommunicationis*. And being granted, *if, &c.* And *Ashley* shewed cause why it should not issue, *viz.* There ought to be a Declaration in the Ecclesiastical Court of the Excommunication, before any may prohibit him the Church. *Richardson* said, That the Proceedings are not contrary to the Statute, but stood with the Statute. And it was said by *Telverton*, It seems there ought to be a Declaration in the Ecclesiastical Court: But the difference is, where it is *Officium Judicis*, or *Ad instantiam partis*, they will give Costs, which ought not to be. *Hutton* and *Richardson*, If the party will not

not prosecute it, none will take notice of it, and they proceed to give Costs, then a Prohibition may be granted. And if he be a Minister, he ought to be suspended for an offence against the Statute. And it ought to be first declared, and so to Excommunication; and that cannot be pleaded, if it be not under Seal, *Dyer* 275. And after all these were agreed by the Court, and no Prohibition was granted (b).

(15.) B. was sued in the Ecclesiastical Court in a cause of Defamation in another Diocese than that wherein he lived, and being cited, was for Non-appearance Excommunicated, and upon Significavit the Writ de Excommunicato Capiendo was awarded. Serjeant Finch, Recorder, prayed a *Superfedeas* for two Reasons. (1) Upon the Statute of 23 H. 8. because he was sued out of the Diocese, to which the Court (*viz. Jones and Whitlock*) answered, That at the Common Law a Bishop cannot cite a Man out of his Diocese. And that the Statute of 23 H. 8. inflicts a punishment, &c. And *Whitlock* said, That a Bishop hath not power of Jurisdiction out of his Diocese, but to absolve him being Excommunicate. (2) Upon the Statute of 5 Eliz. cap. 23. because the case of Defamation is not within the Statute, and then the Statute Enacts, That it shall be void. To which the Court answered, That he ought to aver that by way of Plea; and so also said the Clerks of the Court, that he ought to have sued a *Habeas Corpus*, and upon Return thereof to plead. But the Plea was admitted *de bene esse*, and the party bailed (i).

(16.) No Letters of Excommunication are to be received in stay of Action, if they are not under the Seal of the Ordinary (k), for an Excommunication under the Seal of the Commissary is not to be allowed in such case (l). If the principal cause of the Action, for which the Excommunication was, be not comprized within the Letter of the Certificate, it is not to be allowed; that so it may appear to the Court, That the Ecclesiastical Court had Jurisdiction of the Cause for which he was Excommunicated.

(m.) The Certificate ought to be *Univerſis Eccleſiæ Filiis*, or to the Justices of the Court where the Suit is to be stayed (n). Also the Excommunication certified ought to be duly dated, that is, the Certificate ought to contain the day of the Excommunication (o). A Certificate by the Archdeacon is sufficient by the Custom (p); And upon an *Excommunicato Capiendo*, if it appears that the Excommunication was by an Archdeacon of some certain place, it ought also to appear either expressly or by implication in the Certificate, that the matter for which the Excommunication was, was within his Jurisdiction, otherwise it is not good (q).

(b) *Vintr* a-
gainst *Eaton*.
Hutleys Rep.

(i) *Browns Caf.*
Latch. Rep.

(k) 20 H. 6. 1.

(l) *Ibid.* Ad-
judged.

(m) 14 H. 4.

(n) 20 H. 6. 23.

(o) 20 H. 6. 25.

(p) *Contra*

8 H. 6. 13.

(q) 14 Jac.

Starlings Case.

Roll. Abr. ver.

Excommunica-

tion.

(17.) F.

Excom. Cap.
Incertaincy.

Hill. 12 Jac.
B.R. Fox his
Case.
Rol. Rep.

Co. 8. Trollop
Case. 6 Jac.

Trin. 6. Car.
B.R. Hughes
Case.
Cro. per. 3.

20 H. 22 (3)
-20 H. 22 (3)
-20 H. 22 (3)

Tr. 6 Car. B.R.
The King and on
Redmans Case.
Cro. per. 3.

20 H. 22 (3)
20 H. 22 (3)
20 H. 22 (3)

20 H. 22 (3)
20 H. 22 (3)
20 H. 22 (3)

(17.) *F.* being apprehended upon an *Excommunicato Capiendo*, and the *Significavit* being, That he was Excommunicated for not answering Articles, and not shewing what they were, his discharge was prayed for the Incertaincy thereof, and per *Curiam* it is not good, and therefore was bailed: *Coke* 22 *Ed. 4.* is, That a Man was Excommunicated for certain Causes, not good; and so *Co. 5. Asfcots Case* *Schismaticus inveteratus* is not good Excommunication, nor shall be allowed in the cause of him who Excommunicates him, 5 *E. 3. quod fuit concessum per Doderidge.*

(18.) In *Trollop Case* it was resolved, That the Official cannot certify Excommunication, for none shall do that, but he to whom the Court may write to assai the party, as the Bishop and Chancellor of C. or O. and for that if a Bishop certify and die before the Return of the Writ, it shall not be received, but the Successor shall do it; and one Bishop shall not certify an Excommunication made by a Bishop in another Court, but a Bishop after Election before the Consecration may and so may the Vicar-General, if it appears that the Bishop is in *Remota agenda*; also that the Suit and the Cause are to be expressed in the Certificate, that the Temporal Court may judge of the sufficiency, and if it be insufficient (as if a Bishop certify an Excommunication made by himself in his own Cause) the Court may write to absolve him.

(19.) *H.* was condemned in the Chancellors Court of Oxford, in Costs, and had not paid; an *Excommunicato Capiendo* being awarded upon a *Significavit*, returned and delivered here in Court, according to the Statute of 5 *Elix. cap. 23.* He was Arrested hereupon. Resolved, The Excommunication was good, though the *Significavit* doth not mention any of these Causes in the Statute, but it is for other Causes; but if any *Capias* with Proclamations and Penalties be therein awarded, the Penalties be void, unless the *Significavit* express it to be for one of the Causes mentioned in the Statute.

(20.) In another Case, where a Man was Excommunicated up-
The King and on a Sentence in the Delegates for Costs in *Castigatione Morum*,
Redmans Case. 21 *Jac.* a *Capias* with Proclamations issued; and he being taken,
Cro. per. 3. *Quod* the *Excommunicato Capiendo* pleads, That the offence and contempt was pardoned by the General Pardon of 21 *Jac.* It was agreed, That the Pardon did not discharge the Costs of the party, which was taxed before the Pardon: It was moved there, That as the Costs were not taken away, so no more was the Excommunication, which is the means to enforce them to be paid. But resolved, That this Excommunication before the Pardon, is but for a Contempt to the Court, and all Contempts in all Courts are discharged by the Pardon; wherefore the same was discharged;

charged; and for the payment of the Costs, the Party is to have new Procefs.

(21.) A man was taken upon an *Excommunicato Capiendo*; and the *Significavit* did not mention, That he was commorant within the Diocels of the Bishop at the time of the Excommunication, and for that cause the Party was discharged. And in an Action where an Excommunication was pleaded in Barr, and the Certificate of the Bishop of *Landaff* shewed of it, but did not mention by what Bishop the Party was Excommunicated, it was for that reason adjudged void.

Blamonts Case.
Morts Rep.

L. Abergavenny
and *Edwards*
Case.
Morts ibid.

(22.) Upon a Contract Sentence in the Ecclesiastical Court was, That the Defendant should marry the Plaintiff, he did not do it, for which cause he was Excommunicated. The Defendant appealed to the *Delegates*, by whom the Cause was remitted to the Judge *a quo*, who Sentenced him again, where he was also Excommunicated again for non-performance of the Sentence: He appealed to the Court of *Audience*, and then had Absolution. He was taken by a *Capias Excom.* upon the first Excommunication, upon a *Habeas Corpus* it was Resolved, That the absolution for the later had not purged the first Excommunication, *quia Ecclesia decepta fuit.* (2.) That the Appeal did not suspend the Excommunication, although it might suspend the Sentence.

Mary Powell
and *Herman's*
Case.
Morts Rep.

(23.) In *Weston and Ridges Case* it was Resolved, That upon an Information exhibited in the Ecclesiastical Court, for laying of violent hands upon a Clerk, and Costs there given against the Defendant, for which he was Excommunicated for not paying them; a Prohibition should issue forth, because it was not at the Suit of the Party, and Costs are not grantable there upon an Information.

Morts ibid.

(24.) In the Case of Prohibitions it was Resolved, *Mich. 8 Jac.* That if a man be Excommunicated by the Ordinary, where he ought not, as after a General Pardon, &c. And the Defendant being negligent, doth not sue a Prohibition, but remains Excommunicate by Forty days, and upon Certificate in Chancery is taken by the Kings Writ *de Excommunicato Capiendo*, no Prohibition lies in this case, because he is taken by the Kings Writ. Then it was moved, what Remedy the Party hath who is wrongfully Excommunicated: to which it was answered, he hath Three Remedies, *viz.* (1.) He may have a Writ out of Chancery to absolve him, *14 H. 4. fol. 14.* And with this agrees *7 Ed. 4. 14.* (2.) When he is Excommunicated against the Law of this Realm, so that he cannot have a Writ *de Cautione admitterenda*, then he ought *Parere mandatis Ecclesie in forma Juris*, i. e. *Ecclesiastici*, where in truth it is *Excommunicatio contra jus & formam Juris*, i. e.

Mich. 8 Jac.
Co. lib. 12.

Communio Juris : But if he shew his Cause to the Bishop, and request him to assail him, either because he was Excommunicate after the Offence pardoned, or that the Cause did not appear in Ecclesiastical Cognizance, and he refuse, he may have (as the Lord Coke says) an *Adiun fur le Case* against the Ordinary; and with this agrees *Dr. & Stu. lib. 2. cap. 32. fo. 119.* (3.) If the Party be Excommunicated for none of the Causes mentioned in the Act of 5 Eliz. cap. 23. then he may plead this in the Kings Bench, and so avoid the Penalties in the Act. *Nota*, It was Resolved by the Court, &c. That where one is cited before the Dean of the Arches (in cause of Defamation, for calling the Plaintiff *Whore*) out of the Diocese of London, against the Statute of 23 H. 8. and the Plaintiff hath Sentence, and the Defendant is Excommunicated, and so continues Forty days; and upon Certificate into Chancery a Writ of *Excommunicato Capiendo* is granted, and the Defendant taken and Imprisoned thereby, That he shall not have a Prohibition upon the Statute of 23 H. 8. for no Writ in the Register extends to it; but there is a Writ there called *De Cautione admittenda de parendo Mandatis Ecclesie*, when the Defendant is taken by the Kings Writ *De Excommunicato Capiendo*, and to assail and deliver the Defendant.

Co. Ibid.

(25.) Where the Court of B. R. was moved for the Bailing of one, who was taken by force of a *Capias de Excommunicato Capiendo*, upon the Statute of 5 Eliz. cap. 23. and came to the Bar by a *Habeas Corpus*. Williams Justice, He that is taken by force of a *Capias de Excommunicato Capiendo*, is not Bailable upon the Statute of 5 Eliz. cap. 23. which Statute doth only dispense with the Forfeiture of the Ten Pounds, and such a Person is not Bailable; and as to the other matter, the same remains as it was before at the Common Law, and the Statute of 5 Eliz. dispenseth only with the Penalty of Ten Pounds. Telvorton Justice of the contrary Opinion, and that in this case he is Bailable. Fleming Chief Justice, This is a Case which doth deserve very good consideration, and that therefore he would consider well of it, and also of the Statute of 5 Eliz. before he would deliver his Opinion. Williams Justice, Clearly he is not Bailable in this case. Afterwards at another time, it was moved again unto the Court to have him Bailed. Telvorton Justice, That he is Bailable; and so it was Resolved in one Keyser's Case, where he was taken by a Writ *De Excommunicato Capiendo*, brought hither by a *Habeas Corpus*, and upon Cause shewed he was Bailed by the Court, *de die in diem*; but neither the Sheriff nor any Justice of Peace in the Country can Bail such a one, but this Court here may well Bail, as in the Case before, *de die in diem*. It was further alledged here

here in this case, That in the Ecclesiastical Court they would not there discharge such a one, being taken and Imprisoned by force of such a Writ, *De Excommunicato Capiendo*, without a great Sum of Money there given, and a Bond entred into for the same; otherwise no discharge there. *Yelverton* Justice and the whole Court, The Bishop ought not to take such a Bond for the performance of their subraiffion. The Rule of the Court here in this was, That upon their submission they shall be Absolved, without any such Bond entred into. *Flemming* Chief Justice, They shall absolve them, and if they perform not according to their promise and undertaking, they may then be taken again by the Writ *De Corpore Excommunicato Capiendo*; but the Bishop is to take no Bond of them for their Absolution, to perform their Submission; the taking of such Bond by them being against the Law: And as to the Bailment, all the Judges (except *Williams* Justice) did agree that he was Bailable, and so by the Order and Rule of the Court he was Bailed. *Vid. Bulfr. Rep. par. 1. fo. 122. Pasch. 9 Jac. in Case of Hall vers. King.*

Of the Statutes of Articuli Cleri, & Circumspecte agatis.

1. *Several Statute-Laws relating to Ecclesiastical Persons and things, enacted under the Title of Articuli Cleri, in the Ninth year of King Ed. 2.*
2. *Some other Statute-Laws touching Ecclesiastical Matters, made the Fourteenth year of King Ed. 3.*
3. *The Ratification and Confirmation of the 39 Articles of Religion: The Subscription required of the Clergy.*
4. *Certain Cases wherein a Prohibition doth not lie to the Ecclesiastical Courts, according to the Statute of Circumspecte agatis, made the Thirteenth of King Ed. 1. And in what case a Consultation shall be granted.*

(1.) **T**HERE are certain Statutes made in the time of King Ed. 1. and Ed. 2. touching Persons and Causes Spiritual and Ecclesiastical (a). By the latter of these it is Enacted, (1.) That upon demand of Tithes, Oblations, &c. under that name, a Prohibition shall not lie, unless the demand be of Money upon the Sale thereof (b). (2.) That upon debate of Tithes amounting to a Fourth part of the whole, and arising from the Right of Patronage, as also upon demand of a Pecuniary Penance, a Prohibition may lie: Not so, in case of demand of money voluntarily accorded unto by way of Redemption of Corporal Penance enjoyed (c). (3.) That upon demand of money compounded for in lieu of Corporal Penance enjoyed for the Excommunication, for laying violent hands on a Clerk, a Prohibition shall not lie (d). (4.) That notwithstanding any Prohibition, the Ecclesiastical Jurisdiction may take cognizance and correct in Cases of Defamation, and the money paid for redeeming the Corporal Penance thereon enjoyed may receive, notwithstanding a Prohibition be shewed (e). (5.) That no Prohibition shall lie, where Tithe is demanded of a Mill newly erected. (6.) That in cases of a Mixt Cognizance (as in the Case aforesaid, of laying violent hands on a Clerk, whereby the Kings

45, 49. F. N. B. fo. 52. m. 53. 1 Raⁿ. pl. fo. 487, &c. Co. lib. 4. fo. 20. Fro.

(a) An. 9 Ed. 2.
An. 14 Ed. 3.
c. 3.
(b) 2 H. 5.
fo. 10.
8 Edw. 4.
13 Fitz. Pro.
hiz. 18, 20, 27.
(c) 31 H. 6.
fo. 13.
28 H. c. fo. 20.
12 E. 4. 13.
Reg. fo. 45. 50.
V. N. B. fo. 32.
F. N. B. fo. 30,
42.
Regist. fo. 35.
Coke pl. fo.
465.
(d) Regist.
fo. 51, 52, 57.
F. N. B. fo. 52,
53. A. Rast.
pl. fo. 483.
(e) Regist. fo.
45, 49. F. N. B. fo. 52. m. 53. 1 Raⁿ. pl. fo. 487, &c. Co. lib. 4. fo. 20. Fro.

Peace is broken, and such like) the Temporal Court may discuss the same matter, notwithstanding Judgment given by the Spiritual Court in the case (f). (7.) That the Kings Letters may not issue to Ordinaries for the discharge of Persons Excommunicate, save only in such Cases as wherein the Kings Liberty is prejudiced by such Excommunication (g). (8.) That Clerks in the Kings Service, if they offend, shall be correct by their Ordinaries, but Clerks, during such time as they are in his Service, shall not be obliged to Residence at their Benefices (h). (9.) That Distresses shall not be taken in the ancient Fees wherewith Churches have been endow'd; otherwise, in possessions of the Church newly purchased by Ecclesiastical Persons (i). (10.) That such as abjure the Realm, shall be in peace so long as they be in the Church, or in the Kings Highway (k). (11.) That Religious Houses shall not by compulsion be charged with Pensions, Resort, or Purveyors (l). (12.) That a Clerk Excommunicate, may be taken by the Kings Writ out of the Parish where he dwells. (13.) That the examination of the Ability of a Parson presented unto a Benefice of the Church, shall belong unto a Spiritual Judge (m). (14.) That the Elections to the Dignities of the Church shall be free without fear of any Temporal Power (n). (15.) That a Clerk flying into the Church for Felony, shall not be compelled to abjure the Realm (o). (16.) And lastly, That the Privilege of the Church being demanded in due form by the Ordinary, shall not be denied unto the Appellor, as to a Clerk confessing Felony before a Temporal Judge.

Coke lib. 4. fo. 57. Dyer fo. 273. (n) St. 3 Ed. 1. 5. (o) *Nota*, This is also Repealed by the Statute of 1 Jac. 25. & 21 Jac. 28.

(2.) In conformity to the premisses there were other Statutes after made in the time of King Ed. 3. whereby it was Enacted, (1.) That the Goods of Spiritual Persons should not, without their own consents, be taken by Purveyors for the King. (2.) That the King shall not collate or present to any vacant Church, Prebend, Chappel, or other Benefice, in anothers Right, but within Three years next after the Avoidance (p). (3.) That the Temporalities of Archbishops, Bishops, &c. shall not be seized into the Kings hands without a just cause, and according to Law (q). (4.) That no waft shall be committed on the Temporalities of Bishops during Vacancies, and that the Dean and Chapter may (if they please) take them to Farm (r). (5.) And lastly, That the Lord Chancellor or Lord Treasurer may, during such Vacancies, demise the Temporalities of Bishopricks to the Dean and Chapter for the Kings use.

(3.) And

(f) *Rast.* pl. 488. Coke lib. 4. fo. 16. 20. (g) 1 Eliz. 23. Regist. 65. V. N. B. fo. 33. 35. F. N. B. fo. 62. &c. 5 Ed. 3. fo. 8. Co. lib. 8. f. 68. (h) Regist. fo. 58. (i) Regist. fo. 98. 183. F. N. B. fo. 173. 174. 2. St. 52 H. 3. 15. (k) *Nota*, This was repealed by 1 Jac. 25. & 21 Jac. 28. (l) *Rast.* pl. 373. St. 3 Ed. 1. 1. (m) Regist. fo. 53. F. N. B. fo. 35. l. *Rast.* pl. 497.

14 Ed. 3.

(p) *Nota*, This is Repealed by the St. 25 E. 3. (q) Stat. 25 E. 3. 6. Regist. fo. 32. St. 1 Ed. 3. 2. 2 Sess. (r) F. N. B. f. 55. b.

Aug. 1562. St.
13 Eliz. c. 12.
Where the Pen-
alty for main-
taining of Do-
ctrine against
the Articles, is
Deprivation.

(5) Vid. Dyer.
23 Eliz. 377.
& l. 6. f. 69. In
Gru's Case.

(6) Per Wray,
B. R. Pasch.
23 Eliz. Smith's

Case. Vid. Co. Inst. p. 4. c. 74. verb. *Subscriptions*.

(7) Col. 7. f. 44.
& l. 5. f. 67. &
Inst. par. 2.
f. 487.

(3.) And as there are *Articuli Cleri*, so there are also *Articuli Religionis*, being in all Thirty nine; Agreed upon at a Convocation of the Church of England, An. 1562. Ratified by Queen Elizabeth under the Great Seal of England, Confirmed and Established by an Act of Parliament, with his Majesties Royal Declaration prefixed thereunto. Which Act of Parliament requires a Subscription by the Clergy to the said Thirty nine Articles; the same also being required by the Canons made by the Clergy of England at a Convocation held in London, An. 1603. and ratified by King James. The said Subscription refers to three Articles. (1.) That the Kings Majesty under God is the only Supream Governor of the Realm, and of all other his Highness Dominions and Countries, &c. (2.) That the Book of Common Prayer, and of Ordaining of Bishops, Priests, and Deacons, containeth nothing in it contrary to the Word of God, &c. (3.) That he alloweth of the said Thirty nine Articles of Religion, and acknowledgeth them to be agreeable to the Word of God. By the Statute of 13 Eliz. 12. the Delinquent is disabled and deprived *ipso facto*, but the Delinquent against the Canon of King James, is to be prosecuted and proceeded against by the Censures of the Church (5); And it is not sufficient, that one subscribe to the Thirty Nine Articles of Religion, with this Addition [so far forth as the same are agreeable to the Word of God.] For it hath been Resolved by Wray Chief Justice, and by all the Judges of England, That such Subscription is not according to the Statute of 13 Eliz. because the Subscription which the Statute requires must be absolute: but this is no other than Conditional (6).

(4.) The *Circumspecte agatis* is the Title of a Statute made in the Thirteenth year of Ed. 1. An. D. 1285. prescribing certain Cases to the Judges, wherein the Kings Prohibition doth not lie (7). As in case the Church-yard be left unclosed, or the Church it self uncovered, the Ordinary may take Cognizance thereof, and by that Statute no Prohibition lies in the Case. Nor in case a Parson demands his Oblations, or the due and accustomed Tithes of his Parishioners; nor if one Parson sue another for Tithes great or small, so as the fourth part of the Benefice be not demanded; nor in case a Parson demand Mortuaries in places where they have been used and accustomed to be paid; nor if the Prelate of a Church, or a Patron demand of a Parson a Pension due to him; nor in the Case of laying violent hands on a Clerk; nor

nor in Cafes of Defamation where Mony is not demanded; nor in Cafe of Perjury. In all which Cafes the Ecclesiastical Judge hath Cognizance by the faid Statute, notwithstanding the Kings Prohibition. So that the end of that Statute is, to acquaint us with certain Cafes wherein a Prohibition doth not lie. And the Statute of 24 *Ed.* shews in what Cafe a Consultation is to be granted (*w*). And by the Statute of 50 *Ed.* 3. *cap.* 4. no Prohibition shall be allowed after a Consultation duly granted: provided that the matter of the Libel be not enlarged, or otherwise changed (*x*).

(*w*) Reg. 644.
F. N. B. f. 50.
c. 53. h.
V. N. B. f. 32.
Rast. pla. 483.
12 H. 7. f. 22.
2 H. 4. f. 9.
Fitz. Consult.
tat. 1, 2, 4, 5.
(*x*) Reg. f. 45.
V. N. B. f. 33.
F. N. B. f. 45. a.

CHAP. XLIV.

Of several Writs at the Common Law pertinent to this Subject.

1. *What the Writ of Darrein Presentment imports, in what case it lies, and how it differs from a Quare Impedit.*
2. *Assise de utrum, what, and why so called.*
3. *Quare Impedit, what for, and against whom it lies.*
4. *What a Ne admittas imports, the use and end thereof.*
5. *In what case the Writ [Vi Laica removenda] lies.*
6. *What the Writ Indicavit imports, and the use thereof.*
7. *What the Writ Advocatione Decimarum signifies.*
8. *Admittendo Clerico, what, and in what case issuable.*
9. *The Writ [Beneficio primo Ecclesiastico habendo] what.*
10. *The Writ [Cautione Admittenda,] and the effect thereof.*
11. *The Writ of [Clerico infra Sacros ordines constituto, non eligendo in Officium,] what the use or end thereof.*
12. *The Writ [Clerico capto per Statutum Mercatorum] what.*
13. *What the Writ of [Clerico convicto commissio Goale in defectu Ordinarij deliberando] was.*
14. *What the Writ of [Annua Pensione] was anciently.*
15. *The Writ of Vicario deliberando occasione cujusdam Recognitionis] what.*
16. *Three Writs relating to Persons Excommunicated.*
17. *Assise of Darrein Presentment brought after a Quare Impedit in the same Cause, abates.*
18. *Difference of Pleas by an Incumbent, in respect of his being in by the Presentment of a Stranger, and in respect of his being in by the Presentment of the Plaintiff himself.*
19. *Notwithstanding a recovery upon a Quare Impedit, the Incumbent continues Incumbent de facto, until Presentation by the Recoverer.*
20. *Of what things a Quare Impedit lies, and who shall have it.*
21. *Who may have a Quare Impedit, and of what things.*
22. *How, and for whom the Writ of Right of Advowson lies.*
23. *What the Writ de Jure Patronatus, and how the Law proceeds thereon.*
24. *The Writ of Spoliation, what, and where it lies.*

25. *The Writ Vi Laica removenda* further explain'd.
26. *The Writ Quod Clerici non eligantur in Officium.*

(1.) **A**gainst the unlawful Possessor,* who is the Usurper, lieth Three Writs, viz. One of the Right, as the Writ of Right of Advowson; and the other two, of the Possession, viz. A *Quare Impedit*, and *Darrein Presentment*. This Assize of *Darrein Presentment* or *Assisa ultima Præsentationis* is a Writ, which lieth where a man or his Ancestor hath presented a Clerk to a Church, and after (the Church becoming void by his death or otherwise) a stranger Presents his Clerk to the same Church, in disturbance of him who had last presented. This Writ is otherwise also used (a); and differs from that of a *Quare Impedit*, for the *Quare Impedit* lies upon disturbance of one who hath the Advowson in his Presentation, when the Church is void: "The other lies, where a Man or his Ancestors had presented before, and now (the Church becoming void again) a stranger Presents in disturbance of him who had last presented. Where ever a man may have Assise of *Darrein Presentment*, he may have a *Quare Impedit*, but not *e contra* (b)." He that hath Right to Present after the death of the Parson, and bringeth no *Quare Impedit* nor *Darrein Presentment*, but suffereth a stranger to usurp upon him, yet he shall have a Writ of right of Advowson; but this Writ lieth not, unless he claim to have the Advowson to him and his Heirs in Fee-simple (c). Where the Ordinary, Metropolitan, or King Presents for Lapse, any of these Collatives will serve the Patron for a possession in his Assize of *Darrein Presentment* (d), which Assize of *Darrein Presentment* may not be purchased, pending a *Quare Impedit*, for the same avoidance; and therefore in the Case, where William St. Andrews brought a Writ of Assize of *Darrein Presentment* against the Archbishop of York, Mary Countess of Shrewsbury, and one Hacker; and the Bishop making default, the Countess and Hacker pleaded in Abatement, that the Plaintiff before the Writ purchased, brought a *Quare Impedit* against the same Defendants, and shews all certain, which remains undetermined, and avers that they are both of the same avoidance: And upon Demurrer the Writ was abated by Judgment (e).

(2.) Assize *de utrum* or *Assisa utrum*, is a Writ which lieth for a Parson against a Lay-man, or for a Lay-man against a Parson, for Land and Tenements doubtful, whether it be Lay-Fee or Fee-Alms (f). These Writs are called *Assizes*, probably either because they settle the Possession, and so an outward Right in him that obtains by them; or because they were originally executed at a certain time and place formerly appointed; or because they are

(a) Vid. Brañt. l. 4. tract. 2. Reg. Orig. l. 30. & F.N.B. c. 193

(b) Terms of Law verb. *Quare Imp.*

(c) Ibid. (d) 5 H. 7. 43. F.N.B. 31. F. Mich. 12 Jac. Rot. 2542. Colt and Glover vers. Bishop of Coven-try and Lichfield. Hob. Rep.

(e) Mich. 15 Jac. rot. 32. C. B. William St. Andrews vers. Archbishop of York & alios. Hob. Rep.

(f) Vid. Brañt. l. 4. Tract. 5. c. 1. & seq. Britton c. 95.

tried most commonly by especial Courts set and appointed for that purpose. The Incumbent as touching his Right for his Rectory, hath the only Writ of *Juris utrum*, and for his possession any other possessory Action.

(3.) *Quare Impedit* is a Writ which lieth for him, who hath purchased an Advowson in Gross, or a Mannor with an Advowson thereunto appendant, and against him, who (when a Parson Incumbent dieth, or a Church otherwise becomes void) disturbeth the other in the right of his Advowson, by presenting a Clerk thereunto being void. This Writ is distinguish'd from the former of *Darrein Presentment* or *Affisa ultima Presentationis*, because this later lieth (as aforesaid) only where a Man or his Ancestors formerly presented, but the *Quare Impedit* lies properly for him, who himself was the Purchaser of the Advowson; though he that may have Affize of *Darrein Presentment*, may have the other if he please, but not so *Vice Versa*, as was also before observed. Yet it is said in *Reg. Orig. f. 30.* That a *Quare Impedit* is of a higher Nature, than an Affize of *Darrein Presentment*, because it supposeth both a Possession and a Right (g). Which *Quare Impedit* the Executors of a Testator may (as well as himself might) have upon a disturbance made to the Presentment; and so was the Opinion of the whole Court in *Smallwoods Case* against the Bishop of *Coventry and Litchfield*, that the Executors may have a *Quare Impedit* upon a disturbance made to the Presentation (h), which Writ lieth also of a Chappel, Prebend, &c. (i). And in case after the death of the Ancestor of him that Presented his Clerk unto a Church, the same Advowson be assigned in Dower to any Woman, or to Tenant by the Courtesie, who doth Present, and after the death of such Tenant, the very Heir is disturbed to Present when the Church is void, it is in his election whether he will sue the Writ of *Quare Impedit* or of *Darrein Presentment*; the which, it seems, is also to be observed in Advowsons Demised for term of life, or years, or in Fee Tail (k). And Damages shall be awarded in both these Writs, that is, if the time of six Months pass by the disturbance of any, so that the Bishop doth thereby Collate to the Church and the very Patron lose his Presentation for that turn, Damages shall be awarded for two years value of the Church: And if the six months be not elapsed, but the Presentment be deraigned within that time; then damages shall be awarded to the half years value of the Church: And if the disturber hath not wherewith to satisfy the Damages, where the Bishop collateth by lapse of time, he shall suffer two years Imprisonment; and a half years imprisonment, where the Advowson is deraigned within the half year (l). Likewise, he that recovers a Mannor, whereunto an Advowson

(c) Old N. B. f. 27. Braft. l. 4. Tract. 2. c. 6. Brit. c. 92. F. N. B. f. 32. Reg. Orig. f. 30. & West. 2. c. 5. (h) Trin. 31 El. C. B. *Smallwoods Case*. Leon. Rep. (i) St. W. 2. & in dist. C. (k) St. 13 Ed. 1. c. 5. & Fitz. Dar. Pref. (l) Stat. ib. Fitz. Damage. 49. 17. 29. 38. 93. 106. Fitz. Q. Imp. 34. 45. Dy. f. 135. 236. 241. Kel. f. 57. Fitz. En. 53. Co. l. 6. f. 48. l. 9. t. 26. In *Brookesbyts Case* 31 El. it was resolved, that an Executor shall have a Q. Imp. for a disturbance made in vita Testatoris, if the Avoidance be a chattel vested.

vowson is appendant, being disturbed to present when the Church is void, shall have a *Quare Impedit* (m). In which, as also in Affize of *Darrein Presentment*, plenarty of the Defendants or Disturbers party is no plea (n); but two *Quare Impedit*s of one Church, and for one avoidance a man cannot have (o). In the Case between the King and the Bishop of *Norwich* and *Saker* and *Cole* it was resolved that when one is Admitted, Instituted and Inducted, by the Presentation of a common person, though it was upon an usurpation upon the King, yet the King cannot remove the Incumbent without a *Q. Impedit* brought, for the Church is full of him till he be removed—*Cro. par. 2.*

(m) St. 7 H. 8. 4
(n) St. 13 Ed. 1. c. 5.
(o) Palch. 15 Jac. E. of *Bisford* vers. the Bishop of *Exeter*.

(4.) *Ne admittas*, is a Writ that lieth for the Plaintiff in a *Quare Impedit*, or him that hath an Action of *Darrein Presentment*, depending in the Common Pleas, and feareth that the Bishop will admit the Clerk of the Defendant during the dependency of the Suit betwixt them. This Writ must be sued within six months next after the Avoidance, because after the six months the Bishop may Present by the Lapse. Therefore if the Patron of a Church Vacant, having or not having any Controversie depending with another touching the right of Presentation, doubteth that before he makes his Presentation, the Bishop may collate a Clerk of his own, or admit a Clerk Presented by another to the same Benefice unto which he hath such right of Presentation, he may at his own Suit have this Writ of *Ne admittas* directed to the Bishop forbidding him to collate or admit any to that Church during the time aforesaid (p).

(p) Reg. Orig. fo. 31. F. N. B. fo. 37.

(5.) *Vi Laica Removenda*, is a Writ which (upon the Bishops Certificate into Chancery of a force and resistance touching a Church) lieth where a Debate or Controversie is between two Parsons for a Church, the one whereof doth enter into the Church with a strong hand and great power of the Laity, holding the other out, and keeping possession thereof *vi & armis*; whereupon he that is so held out of possession may have the said Writ directed to the Sheriff of the County, to remove the force within that Church, and (if need be) to raise the *Posse Comitatus* to his assistance, and to Arrest and Imprison the Persons that make resistance, so as to have their Bodies before the King at a certain day to answer the Contempt: which Writ is ever made returnable, and is sometimes grantable without the Bishops Certificate, as aforesaid, for it may, it seems, be had upon a surmise made thereof by the Incumbent himself without such Certificate; there being a distinct and several form thereof in each of the said Cases (q). So that this Writ properly lieth for the removal of any forcible possession of a Church kept by Lay-men.

(q) F. N. B. fo. 54. Reg. Orig. fo. 55, 60.

(6.) *Indicavit* is a Writ in the nature of a Prohibition, issuing out of the Kings Temporal to his Ecclesiastical Courts, and lieth for the Patron of a Church, whose Clerk is Defendant in some Spiritual Court in an Action of Tithes commenced against him by another Clerk, and extending to the value of the fourth part of the Church, or of the Tithes belonging thereunto; for in this Case the Cognizance thereof belongs to the Kings Temporal Courts by the Stat. of *Westm. 2. c. 5.* wherefore, the Defendants Patron being like to be prejudiced thereby in his Church and Advowson, in case the Plaintiff should prevail and obtain in the Spiritual Court

(r) Reg. Orig. fo. 35. b. Vid. Old N. B. fo. 31. and the Reg. fo. 35. and Brit. c. 109. tit. 2.

(r). So that this Writ lieth properly where there is a Contest or Controversie between two Clerks in an Ecclesiastical Court of a Church, or part thereof for Dismes or Tithes amounting at the least to the value of the Fourth part of the Church; In which regard the Patron of the Clerk Defendant, losing his Advowson in case the Plaintiff should recover in the Spiritual Court, shall have this Writ directed to the Clerk Plaintiff, or to the Officers of the Ecclesiastical Court, commanding them to cease their Proceedings, until it be discusst and decided in the Temporal Court, to whom the Cognizance of the Advowson belongs; This Writ shall be between four Persons, whereof two are Patrons, and two are Clerks; and is not returnable as other Writs; but if they cease not their Suit and Proceedings in the Ecclesiastical Court, an Attachment issues (s).

(s) Terms Law verb. *Indicavit.*

(7.) *Advocations Decimarum* is a Writ, that lieth for the claim of the fourth part or upwards of the Tithes that do belong to any Church (t).

(c) Reg. Orig. fo. 29. b.

(8.) *Admittendo Clerico* is a Writ granted to him, who hath recovered his Right of Presentation against the Bishop in the Common Pleas (u).

Upon a *Ne admittas* tried and found for, &c.

(9.) *Beneficio Primo Ecclesiastico habendo* is a Writ directed from the King to the Lord Chancellor, to bestow the Benefice that shall first fall in the Kings gift, above or under such a value, upon this or that person (w).

(u) Reg. Orig. fo. 33. a. F. N. B. fo. 38.

(w) Reg. of Writs fo. 307. b.

(10.) *Cautione admittenda* is a Writ that doth lie against a Bishop, who holdeth and detaineth an Excommunicate Person in Prison, notwithstanding he offers sufficient Caution or Assurance to observe and obey the Orders and Commandments of Holy Church from thenceforth. The form and further effect of which Writ, *vid. Reg. (x).*

(x) Reg. of Writs p. 66. F. N. B. f. 65. & F. N. B. 63. Vid. Roll. Abr. f. 234.

(11.) *Clerico infra sacros ordines constituto, non eligendo in Officium*, is a Writ directed to the Bayliffs, &c. that have imposed a Bailiwick or Beadleship upon one in Holy Orders, charging him to release him thereof (y).

(y) Ib. f. 143. a.

(12.) *Clerico capto per Statutum Mercatorum, &c.* is the delivery of a Clerk out of Prison, who is imprisoned upon the Breach of the Statute Merchant (z).

(z) Ib. f. 147.

(13.) *Clerico convicto Commissio Goale in defectu Ordinarij deliberando*, is a Writ for the delivery of a Clerk to his Ordinary that was formerly convict of Felony, by reason his Ordinary did not challenge him according to the Privileges of Clerks (a).

(a) Ib. f. 169. a.

(14.) *Annua Pensione* is a Writ now grown obsolete and out of use: For whereas anciently there were certain Abbies and Priors that in respect of the Foundation or Creation, were obliged unto an Annual Pension due unto the King for such his Chaplains unprovided of a sufficient Living, as he should nominate and appoint: This Writ in pursuance thereof was wont to issue to such Abbot or Prior, in favour of such whose name was comprised in the said Writ, until, &c. requiring the said Abbot or Prior, that for his said Chaplains better assurance, he give his Letters Patents for the same (b).

(b) Reg. Or. l. 165. & 107.

(15.) *Vicario deliberando occasione cujusdam Recognitionis &c.* is a Writ that lieth for a Spiritual Person imprisoned upon forfeiture of a Recognizance, without the Kings Writ (c). For as there is one Form of the Writ *Statuto Mercatorio*, for the imprisoning of him who hath forfeited his Bond called the *Statuta Merchant*, until the Debt satisfied, as to Lay-Persons: So there is another Form of the said Writ, as against Ecclesiastical Persons (d).

(c) F. N. B. F. 231.

(d) Reg. Orig. l. 147.

(16.) Touching the three Writs, viz. *De Excommunicato capi-endo. Excommunicato deliberando. Excommunicato recipiendo*, vid. *sup. in cap. de Excommunicatione*.

(d) Ib. f. 148.

(17.) The Village of St. Andrews brought a *Quare Impedit* against the Archbishop of York, and Countels of Shrewsbury, and after brought an Affize of *Darrein Presentment* for the same Church. The *Quare Impedit* is returned. It was said by the Court that the Affize of *Darrein, &c.* shall abate, vid. by Hobert. But if he had brought another *Quare Impedit*, it had been well. And so it was resolved in the Earl of Bedford's Case; and by Hutton, that the Statute of W. 2. cap. 5. proves it, viz. *Quod habeant Aff. &c. vel Quare Imp.* but not both, vid. 8 E. 3. 17.

Quare Imp. Darrein Presentment.

Mich. 15 Jac. C. B. Rex. 32. Nay's Rep.

In a *Qu. Imp.* the Plaintiff must alledge a Presentation in himself, or in those under whom he claims; and so must the Defendant.

Sir Jo. Tuston
vers. Sir Ric.
Temple.

Vaugh. Rep.
(f) Lister a-

gainst Cramell.
Noy's Rep.

(g) M. 12 Jac.
B. R. inter

Whistler and
Singleton.

Resolved per
Cur.

Rol. Abr.
verb. Present-

ment, lit. Q.
nu. 6.

(h) M. 13 Jac.
B. R. inter

Fairbank and
Durham.

(i) Co. Lit.
344.

(k) 39 H. 6.
Qua. Imp.

95. per Cur.
(l) 3 E. 3.

Qua. Imp. 57.
3 H. 5, *Qua.*

Imp. 71. ad
mō.

(m) 20 E. 3.
28. b.

(n) 14 H. 4.
11. b.

(o) 18 E. 3. 1.
(p) 50 E. 3. 26.

(q) Term. Law
verb. *Quare Impedit.*

(r) 44 E. 3. 34.

(s) 21 E. 4. 1.

(t) 38 E. 3. 9.

(18.) In a *Quare Impedit* the Incumbent pleads, that before the Action brought he had been in by the space of six months, &c. of the Presentment of S. S. in the Church. This difference was taken by Serjeant *Henden*, and agreed by the Court: when the Incumbent pleads the Presentment of a Stranger, there he ought to shew, *That the Stranger had a Title, and that he was seised of the Advowson, &c. or that he was seised of a Mannor to which, &c.* But where he pleads that he was in for six months of the Presentment of the Plaintiff himself, or by collation by lapse by the Ordinary, there he need not make any Title. 10 E. 4. 11. (f).

(19.) If a man recovers in a *Quare Impedit* against an Incumbent, the Incumbent is so removed by the Judgment, that the recoverer may Present to the Church without other removal of the Incumbent, who yet continues Incumbent *de facto* until there be a Presentation made by the recoverer (g). And after such recovery in a *Quare Impedit*, a Stranger to the recovery cannot Present to the Church, for notwithstanding the recovery, the Incumbent continues Incumbent *de facto* as to all Strangers to the recovery (h).

(20.) A *Quare Impedit* lies of a Donative, and the Writ shall be *Quod permittat ipsum Præsentare ad Ecclesiam, &c.* and set forth the special matter in his Declaration (i). And the Grantee of a next avoidance may have a *Quare Impedit* against the Patron who granted the same (k).

(21.) If the Husband who hath an Advowson in right of his Wife, be disturbed in his Presentation thereto, and dies, the Wife shall have a *Quare Impedit* on that disturbance (l). Also a Chapter may have it against the Dean for their several possessions (m). It lies also of a free Chappel which a man hath by Patent from the King, if the Sheriff refuse to put him into possession thereof (n). A Presentation by the Bishop as Patron, is sufficient for the King to maintain a *Q. Imp.* to the Church, when the Temporalities come into the Kings hand by reason of vacancy of the Bishoprick (o).

(22.) The Writ of Right of Advowson lieth properly for him, who claims to have the Advowson to him and his Heirs in Fee-simple (p). This Writ lies of an Appropriation (q). He that procures this Writ, ought to shew a Possession in himself or Ancestors (r): Admission and Institution of a Clerk without Induction, is not sufficient to maintain this Writ (s).

(23.) When

(23.) When

(23.) When a man Presents his Clerk to the Bishop within the six months, and also another Presents his Clerk, in that Case the Church is *Litigious*, and the Bishop may issue the Writ *De jure Patronatus*, to enquire to whom the right of Patronage belongs. This Writ may also issue out of Chancery to the Ordinary (u). And the Ordinary is to make Inquisition thereon (w). Some question is, at whose costs this Writ shall be sued, whether at the Bishops, or at the Parties? It hath been said, that it shall be sued at the costs of the Ordinary; because it is for his own discharge and for his ease (x). But it seems otherwise, for that the Ordinary is not oblig'd to award a Commission to enquire *De Jure Patronatus ex Officio*, but at the desire of the Parties (y). For when the Church is *Litigious* he may suffer the Lapse to incur without enquiry. 34 H.6.41. *Curia* 35 H.6.18.b. and if he should be obliged to grant it *ex Officio*; then he should never have a Lapse. 35 H.6.19. And by 34 H.6.38. It shall be at the costs of the Parties, for that the Ordinary is Judge in that case (z). If there be but one only that doth Present to the Ordinary; yet he may award a *Jure Patronatus* (a). But if two Present, then there may be two *Jure Patronatus* (b): And if the Ordinary admit his Clerk, for whom the right is found upon the Writ, it will excuse the Ordinary, and he shall be no disturber, although the right in a *Qu. Impedit* be afterwards found for the other Party (c). But if on the said Writ the right be found for one Patron, and afterwards the Ordinary admits the Clerk of another Patron, that is at his peril, for he may (if he please) admit him, notwithstanding the Commission, and the finding for the other (d). For it seems it is but for the Ordinaries better information. But when the right on the said Writ is found for one Patron, and the Ordinary admits the Clerk of the other Patron: if it be afterwards found in a *Quare Impedit*, that the right belongs to that Patron from whom it was found in the *Jure Patronatus*, he will be a disturber (e). It is some question, where the Ordinary may suffer the lapse to incur, after it is found on the said Writ for one of the Patrons? It is supposed that he may not: For 35 H.6.19. *per Prisot*, he shall not have any lapse after it is found for one of them, for he is to admit his Clerk (f). Yet after it is found for one of them, the Ordinary is not obliged to admit his Clerk without a new request made to him by the Clerk, but no need of the Patrons making any new request or presentation (g).

(24.) The Writ of *Spoliation* lies properly by one *Incumbent* against another *Incumbent*, where the right of the Patron comes not into debate (b). And therefore if a Parson be Created Bishop, and hath a dispensation to hold his Rectory, and after the Patron Presents another Incumbent, who is instituted and inducted, the Bishop shall

(u) 34 H.6.39.
b. per Moyle.
(w) 34 H.6.
11. b. per
Prisot.
(x) 5 H.7.22.
per Brian.
But Kible contra.
Et contra
14 H.6.11. b.
per Daby.
and two Do-
ctors, and 35
H.6.19. per
Prisot.
(y) 8 E.4.24.
b. per Curiam.
5 H.7.20. b.
per Kible, and
22 H.6.30. per
Mark.
(z) Rol. Abr.
ver. Present-
ment. lit. P.
pag. 384.
(a) 21 H.6.44.
34 H.6.40.
(b) 21 H.6.44.
(c) 34 H.6.11.
b. per Prisot.
34 H.6.38.
(d) 34 H.6.11.
b.
(e) Ibid. per
Prisot.
(f) 21 H.6.
44. 45.
Roll. ubi supra.
(g) 34 H.6.12.
per Curiam.
(b) F. N. B.
Spoliation.
fo. 36. b. vid.
Cale Edes vers.
the Bishop of
Oxford, in
Vaugh. Rep.

(i) 38 H. 6. f. 19.
Br. Spoliation
pl. 4.

shall have against that Incumbent a *Spoliation*; which proves the Bishop to continue *Incumbent* after his Consecration, and to hold his Rectory by his former Presentation; and in ancient times it was held, that where the Pope doth Licence one, who is created a Bishop, to retain his former Benefice, and the Patron Presents another, if in that case the *Elder Incumbent* sues a *Spoliation* in the Spiritual Court, it well lies, for both claim by the same Patron (2). So that if one happen (during the Incumbents Presentation) to be presented by the same Patron, or do come into the same Church by course of Law, so that the Patronage comes not into debate, a *Spoliation* lies.

O. N. B. 33. b.

(15.) If any man shall hold or keep the Possessions of a Church by force, so that the Bishop or the Parson cannot do their Office there, it shall be removed by the Kings Writ, called *Vi Laica removenda*, as aforesaid: which Writ lies especially where the debate is between two Parsons touching the same Church, or Prebendaries on the Title, and where the one keeps the other out by Force and Arms; but by this the Force only shall be removed, and not the Incumbent, who is in Possession of the Church, whether he be in Possession by right or wrong. And this Writ shall be granted on the bare Surmise of the Incumbent, or party grieved, without any Certificate made by the Bishop into Chancery, as upon such Certificate, and also by reason thereof; and there are two several forms of the Writ in these two Cases; which Writ is returnable or not, at the pleasure of the Party who sues out the same; and may be returned into the Court of Common Pleas as well as into the Kings Bench.

Finch. Nomo-
technia, p. 138.

S. was deprived by the High Commissioners for not conforming to the Canons of the Church; it was general, *quia Refractorius*; but no particular Canon mentioned: The King by reason of the said Deprivation, presented B. who was inducted; but S. would not yield up the Possession of the Parsonage-house: whereupon the Writ of *vi laica* issued out of Chancery; the Sheriff came to the house, but could not apprehend the Parties; B. finding the house empty, entred peaceably; S. made an *Affidavit* in B. R. that he was ousted by the Sheriff by force, and B. put in possession; the Court of B. R. thereupon granted a Writ of Restitution, he having an Appeal depending of the Deprivation: In this Case these Points were resolved; (1.) That the Writ *De vi Laica removenda* is not returnable unless the Sheriff find the Force. (2.) That the Kings Bench cannot award restitution upon an *Affidavit*, but there ought to be a return of the Writ of *Vi Laica &c.* in the Chancery, and upon *Affidavit* made there, that the Sheriff by vertue of the Writ hath removed one and put another in possession, Restitution is awardable. (3.) Resolved, That upon the Deprivation by the High Com-

Commissioners no Appeal lieth, because the Commission is grounded upon the Prerogative of the King, in the Ecclesiastical Government; and therefore the Commissioners being immediate from the King and possessing his Person, no Appeal lieth. (4.) Resolved, That the *Canons* of the Church, made by the Convocation and the King, without Parliament, shall bind in all matters Ecclesiastical, as well as an Act of Parliament: In the Principal Case it was adjudged, that until the Deprivation was repealed, it stood good; and so *B.* had good Title to the Church.

Bird and Smith's Case. Mori's Rep.

A Lease was made of a Rectory, a Parson was Presented to it, and upon a supposition, that he was held out by force, had a *Vi Laica removenda*, upon which the Sheriff returned *Non inveni vim Laicam, nec potentiam armatam*, notwithstanding which return upon *Affidavit*, that he was kept out with Force, a Writ of Restitution was awarded out of the Kings Bench. Yet in *Zakars Case*, *Coke* Chief Justice said, we are to judge upon a Record, and not upon *Affidavits*; in which Case he being deprived for Simony, *Richardson* Serjeant moved the Court to have him restored again, because (as he urged it) he was unlawfully removed. The Reason being, that in a *Vi Laica removenda*, whereby he was removed (which Writ by *F. N. B.* and the Register, comes to remove *omnem vim Laicam*) he shews that the Sheriff did dispossess him, and put another in, the which he ought not to do, and as *Coke* Chief Justice then said, that in so doing he had done against the Law, if he removes one and puts another in; and *Richardson* Serjeant there cited *Robinsons Case*, *Hill. 38 Eliz.* where upon an *Affidavit* made that the Sheriff in a *Vi Laica removenda*, had removed one, and put another in, there this was debated, whether upon this shewed to the Court the first man removed should be restored again or not; and there resolved by the whole Court, the second man to be displaced again, and the first to be restored; and *Coke* said, if a Justice of Peace remove a Force, he cannot put another into Possession.

Roberts and Ammondsams Case. Moor's Rep.

Mich. 13 Jac. B.R. the Kings Case against Zakar. Bulstr. par. 3.

(26.) There is a Writ in the Register, *Quod Clerici non Eligantur in Officium Ballivi, &c.* For all Ecclesiastical Persons in Office are allowed certain Priviledges by the Common Law in respect of their Function, they are exempt from all Personal charges, which might any way hinder them in their Calling, as to be chosen to the Office of a Bayliff, Beadle, Reeve, or the like, in respect of their Lands; to which end the said Writ is provided, which doth recite that by the Common Law they ought not to be chosen to such Offices aforesaid; and commands, that in case any Distress be taken or Amercement levied on any of them on that account, that it shall be restored. So the Stat. of *Marleb. cap. 10.* That Persons of Holy Church, and

F.N.B. 175. b.

Finch. ubi sup. persons Religious, shall not be compelled to come to the Sheriffs
p. 135. Stamf. *Tourn* or *Leet*; and so also it is by the Common Law. In Favour
133. also of Holy Church the Law did anciently allow them Two other
Priviledges, viz. Clergy and Abjuration.

In the Ninth year of the Reign of King *James*, a question was
moved, Whether after the Conviction of an Heretick before the
Ordinary, the Writ de *Heretico comburendo* did at that day lie or
not; as to the resolution of which Question the Judges were then
divided in Opinion, as appears in the Fortieth Chapter precedent,
§. 7. what was then controverted, is now decided by an Act of
Parliament made in the 29th year of his Majesties Reign, whereby
it is enacted, that the Writ commonly called *Breve de Heretico
comburendo*, with all Procefs and proceedings thereupon, in order to
the executing such Writ, or following or depending thereupon,
and all punishment by death, shall be from thenceforth utterly taken
away and abolished.

Cap. 40. sect. 7.
in fin. sect.
pag. 364.

Mich. 13 Jac.
B.R. the King
Case against
R. H. H.
Bulfinch par. 2.

Ἀρχιεπίσκοπος Βασιλεὺς [πάντοτε] δόξα Θεῷ.

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THE APPENDIX.

THe former Tract being only written by way of Essay, it was thought expedient by the Friends of the Bookseller to make some brief Additions in this Second Impression, concerning some things that are of daily Use and Practice in the Ecclesiastical Courts; of whose Methods and Proceeding many being ignorant and unacquainted, have cast upon them many false Aspersions, and harsh and unjust Censures: And therefore by way of Preface I shall set down some few Observations necessary to be known, and shew the Original Growth and Decay of the Canon Law.

(1.) It cannot be denied, but that the Greatness of the Canon Law was in part raised upon the Ruines of the *Roman Empire*; and as the Popes grew potent by their unjust Usurpations, so the Authority of the Secular Prince did wax weak and decline, especially after the Seat of the Empire was translated to *Constantinople*: then by the remote distance thereof the Pope had the greater liberty to exalt his Prerogative without Check or Controul.

(2.) In those times it was more insensibly done, because men were then zealous for the Propagation of the *Christian Religion*, and having a high Reverence for the Dignity and Worth of the *Clergy*, they would not dispute or contradict the Commands of the *Bishops of Rome*; who were revered for Holiness, and famous for their great Works of Piety and Charity, and so their Decrees did easily pass into Laws that were kept with a Religious Observance.

(3.) And indeed it was just, that those who had the Government of the Church and care of Mens Souls, should have a Coercive Power to enforce their Admonitions, which otherwise would have but small Operation upon those that wickedly let loose the Reins of their Lust and Passions. And therefore we find that the Emperors, after they grew Christians, had so much confidence in the Faith and Integrity of Bishops, that they gave them a *Jurisdiction* as to good Manners, and other matters that appertained to the Advancement of Religion, and so they had their Courts of Audience, whose Power is treated of in the Code, *De Episcopali Audientia*.

(4.) The Laws which were anciently made for the Government of the Church, consisted of the Canons of Councils, Sayings of Fathers, and Decrees of Popes sometimes with, sometimes without the consent of the Colledge of Cardinals.

(5.) They were first collected into a Body by *Buchardus Bishop of Worms*, but afterwards more compleatly revived by *Gratian a Monk of Bononia*, when *Eugenius the Third* sat in the Chair, into which many Errors crept by reason of false and spurious Copies. And this made up the first part of the Canon Law, which is called *Decretum*; which after the Correction of *Gregory the Tenth* was of Authority in Courts and Schools.

(6.) The second part of the Canon Law is called the *Decretals*, which after four or five several Collections, received its last and purest Edition in the Time of *Gregory the Ninth*; which although it was much blamed by *Cujacius*, was illustrated with the learned Glosses of *Hosienfis*, *Panormitan*, and many others, and therein are sundry Cases which hapned in England decided, worthy of our Knowledge and Observation.

(7.) The third part of the Body of the Canon Law was collected at the command of *Boniface the Eighth*, which contains these Books; 1. *Sixti Decretalium*. 2. *Clementinarum*. 3. *Extravagantes*, *Job. XXII.* & *Communes*; wherein are contained a Rhapsody of many things that tend to the advantage of his Holiness his Purse, who on purpose made the Laws more strict and narrower, that the greater plenty of Dispensations might be granted.

(8.) Besides these we have our *Legatine Constitutions*, which were in the time of *Otho the Legate of Gregory the Ninth*, and of *Othobon* (that was afterwards *Pope Adrian the Fifth*) who was Legate here to *Clement the Fourth*; both these are illustrated with the Comments of *John de Athin*. To these are joyned in the same Volume our *Provincial Constitutions*, made by our own Archbishops in their Synods or Convocations, which begin in the time of *Stephen Langton Archbishop of Canterbury*, and Cardinal, and end in the

the days of *Henry Chicheley Archbishop of Canterbury, and Cardinal.* An. D. 1434.
These were collected and adorned with the learned Gloss of *William Lindwood Dean of the Arches*, and afterwards *Bishop of St. David's* in the Reign of *Henry the Fifth*.

(9.) But when *Henry the Eighth* did justly throw off the Usurped Tyranny of the Pope, and restored his Kingdoms to their just and undoubted Liberty; the Canon Law, and Provincial and Legatine Constitutions were continued, *quatenus Consuetudinibus & Statutis Regni non repugnant nec Prærogativæ Regiæ adversatur.* 25 H. 8. c. 19. in fine.

“Provided that such Canons, Constitutions, Ordinances and Synodals Provincial being already made, which be not contrariant nor repugnant to the Laws, Statutes and Customs of this Realm, nor to the damage or hurt of the Kings Prerogative Royal, shall now still be used and executed as they were afore the making of this Act, till such time as they be viewed, searched, or otherwise ordered and determined by thirty two Persons, or the more part of them, according to the tenour, form and effect of this present Act; which Act being Repealed in the Reign of *Queen Mary*, was revived 1 Eliz. 1.

(10.) But this design of Purging the Canon Law fell to the ground, and ended with the life of the King, and then was set on foot again by King *Edward the Sixth*, who in his Letter doth nominate eight Persons, two Bishops, two Divines, two Doctors of Law, and two Common Lawyers, being part of the Thirty two aforesaid, to make a model of Laws for the Church, who by the help of Doctor *Haddon* Fellow of *New Colledge in Oxon*, (Sir *John Cheeke* being also supposed an Assistant) compiled that Essay which is entitled, *Reformatio Legum Ecclesiasticarum*, which it is wished might have proceeded so far as to have been ratified by good Authority. 11. Nov. An. 5 Edw. 6.

(11.) So that under these Restrictions mentioned, the Ecclesiastical Laws are consequentially confirmed by Act of Parliament, to which were added those excellent Canons of King *James*; A. Dom. 1603. most of which are but Repetitions of those in *Lindwood*; that so by that New Publication they might have the better and stricter observance. And then the Rubricks of the *Common Prayer Book* are of undeniable Authority, that being confirmed by Act of Parliament. 14 Car. 2.

(12.) The Great Governor in the Church under the King is the Archbishop of *Canterbury*, who hath the Power of *Dispensations* formerly used in the Court of *Rome*, committed to his disposal by Act of Parliament, and under him the due execution of Ecclesiastical Laws are intrusted in the Bishops and their several Officers, that are to make inspection into the Manners of each 25 Hen. 8. 21.

each particular Diocels; which are, the *Chancellor, Commissaries, Archdeacons, Officials and Deans Rural*. In each Cathedral there is a *Dean*, who is *Archipresbyter Urbanus*, who is to govern the Prebendaries and other Officers; but still as Persons subject to, not in the least exempt from, the Episcopal Authority and Inspection; and in case of any *Gravamen* an Appeal is legally directed to the Bishops Consistory.

Precedency.

(13.) And here, by reason of the several and frequent Com-mixtures of Ecclesiastical Persons, who have different Offices, Dignities and Degrees, some may possibly through Ambition or Ignorance dispute the question of *Precedence*, to the disturbance of that Peace and *Decorum* which ought to be kept amongst the Mem-bers of the Church; and that every man might know his own pro-per place and station, it is not inconvenient to set down after what manner the Ecclesiastical Laws have determined this Point. The Ca-non Law hath many disputations of these questions, and there are several decisions of these Controversies that have risen between Eccle-siastical Persons, which hapned by reason of the frequency of their Synodical and Processional meetings, and the offending Party that breaks the Rules of Order, may and ought to be punished by the Dioceſan, if he contemns his Admonition herein.

The Chancellor's Place.

Anth. de Pra-

ris, cap. 6. nu. 5.

L. Vicar. D. de

Legibus.

Barboſæ Alle.

44. §. 135.

C. l. i. c. 38.

Zech. 2. 23. §. 3.

(14.) The Chancellor of the Diocels is generally reputed the most honourable, as representing the Bishops Person, and is therefore called his Vicar-General; *Vicarius Generalis Episcopi, & Officialis Principalis, qui Vices gerit Episcopi. Et dicitur spectabilis, quæ media est dignitas inter illustres & clarissimos.*

(15.) This Office is so necessary to support the Episcopal Power, that in case a Bishop shall neglect to dispose it, (Sir Tho. Rydly saith) the Archbishop may nominate and impose one upon him. And *Zechius de Republ. Ecclesiastica* saith the same, *Tenetur Episcopus sibi Vicarium Constituere, quo deficiente Archiepiscopus potest Constituere.*

(16.) He hath the same Consistory with the Bishop, as the Cano-nists do all prove in their Writings. *Sbrozzius de Officio Vacarij Episcopi* positively affirms it; *Vicarius Episcopi facit idem Consistorium cum Episcopo, & dicitur illi associari in Jurisdictione, Representare Reverentiam Episcopalem, nec datur medius gradus in Dioceſi inter Episcopum & Vicarium, tanquam tribunal unius sit tribunal al-terius; persona unius, persona alterius; unum sit eorum Caput, unum Corpus, unum Agens, & una Actio, & tanquam Episcopus honorandus in loco, Sessione, &c. — Dicit Præminentiam Vicarij locum habere tam Episcopo-præsente quam absente, & Ineptum esse illum mihi An-tecellere in quem Jus dicere possum, seu adsit, seu absit Episcopus. Et eum offendens dicitur ipsum Episcopum offendere. Idem l. 3. qu. 60. Præcedere debet in Ecclesia quamlibet dignitatem primam post Episcopum.*

Vicarius

Lindw. l. 2. t. 4.

de sequist. c. fri-

quen. v. Officia-

lis.

Sbroz. l. 2. c. 25.

Navar. lib. 1.

Con. 3. de Ma-

joritate & O-

bedientia.

Vicarius non censetur exclusus facta mentione de Episcopo, sed continetur sub Episcopi nomine. Habet eandem potestatem quam habet Episcopus, & idem Tribunale & associatus ei in Jurisdictione. That is accounted among the Canonists the greater Dignity; which hath the higher Administration and Jurisdiction: so that the Vicar General that manageth the whole Concerns of the Diocess under the Bishop, doth justly claim Precedency. And so in the Canons of King James they always run in this Order, Chancellor, Commissary, Archdeacon, Official.

Zech. c. 23.
Sbroz. lib. 2.
q. 43. nu. 29.
Fel. c. Si quis
contra, nu. 5.

Can. 123, 124,
125, 128, 135.

(17.) The Precedency is expressly given to the Chancellor before the Archdeacon by all Writers, because the Chancellor represents the Person of the Bishop, and hath the greater Jurisdiction; and an Appeal lies from the Archdeacon, or his Official, to the Chancellor of the Diocess. * Anton. de Prat. de Jurisd. Episcopi, dicit, *Improbata Consuetudinem Jure Divino, Naturali, Canonico & Civili per quam Archidiaconus praefertur Vicario Episcopi, & quod potius dicitur Pestis quam Consuetudo propter Ambitionem, vancoriam stultitiam a qua dicitur praecessisse.* Of this Opinion are Sbroz. Panormitan, Cassanens in Cataloga Glorie Mundi; Barbosa, Rebuffus, Zechius, Card. Jacobatus, Navar. Felinus, Hostiensis, Lindw. Gratianus, & Doctores communiter omnes.

Barbo. All. 54.
S. 143.
Rebuffus de
Vicari. Episcopi.
S. 6.
Jacobat. lib. 1.
de Const. Art. 1.
S. 103.
* C. 6. nu. 47.
Sbroz. lib. 2.
cap. 25.
Callanxus,
part 4. confid.
46.

(18.) By the Canon Law a Lay-man was excluded the Office of a Spiritual Judge; but by an Act of Parliament at the Reformation it was indulged to Doctors of Law to exercise all manner of Ecclesiastical Jurisdiction; and there are at this day several eminent Lay-men Civilians at Doctors Commons, that are an honour to these Prelates; some few places being in the hands of Clergymen that were bred Civilians in the Universities.

37 Hen. 8. 17.

(19.) The Archdeacon is a subordinate Judge, his Place is inferior to the Chancellor, *Archidiaconus proximus post Episcopum & vicariis Vicariis sit minister Domini*, saith Haddon in his Reformation Legum. To him all others of the Clergy of what degree soever, do owe Subjection *Ratione Administrationis & Officii.* And 'tis a Question in the Provincial Constitutions, whether the Archdeacon be not above the Dean. Hostiensis will have the Archdeacon to be *Majorem ratione Jurisdictionis extra Ecclesiam: Sed infra Ecclesiam quoad Ordinem*, he is Minor. But this was to be understood when the Archdeacon was not a Presbyter, for if he were, then *Tam Ratione Ordinis quam Jurisdictionis praeclaret Decanum.* But he concludes, *In his omnibus consideranda est Ecclesiarum Consuetudo*, which gives the Precedency in his Precincts to the Dean; in other places of the Diocess, if 'tis granted, 'tis rather *ex honore quam debita.*

Archidiaconus
Place.
Pag. 46. c. 6.

Lindw. de Vi-
ta & honestate
clericorum.
Ver. Dean.

Prebendaries (20.) But the *Canons* and *Prebendaries* of the Church, be they of what Degree soever, are to give place, as being Inferiors to the *Archdeacon*, by reason of that Power, Office and Jurisdiction which he is intrusted with. As suppose an *Archdeacon* be bus Master of Arts, and the *Prebendaries* of a Church be Doctors of Divinity, Law or Physick; yet they are inferior in Dignity and Place, and ought to allow the Superiority in all places; for if it were otherwise, the *Archdeacon* would receive a diminution of that Reverence and Respect which belongs to him as a Judge; and it is absurd to affirm, that any Clergy-man should take place of him that by reason of his Jurisdiction hath Power and Authority over him: for *Dignities* in the Church are more ancient, and are justly prefer'd before the Degrees of the University.

(21.) What Obedience the Minor oweth to the Major, is set down by *Lindwood*, *Reverentiam debet minor majori, ut viz. sibi assurgat; locum Primum in sedendo, vel stando, vel eundo sibi cedat; mandata etiam majoris bene sit; dum tamen Administratorem vel Officiarium loco illo habeat, parere tenetur; non tamen ipsius Judicio, nisi Jurisdictionem in ipsum habeat.* This slight Designation may give some light to men of ingenious tempers, to prevent Quarrels and Animosities by rendering Honour to whom it is due. And the Great *Selden* saith, That such Reasons are urged by the Canonists in the ranking of *Dignities*, as may be applied to men in Temporal Concerns: *ut si nobis de regibus law si nobis monachis servet yd sibi in eis orbi bus; non debemus imperialis obedi-*

Seld. Titles of Honour, ch. 11.
(22.) The *Dean Rural* succeeds, who was anciently called *Archipresbyter*; he is appointed by the *Bishop* and *Archdeacon* to continue during pleasure. *Non est perpetuus sed amovendus ab officio ad mandum Superioris, cuius est subiectus.* Their Office is to Give an account to the Visitor of the Lives and Manners of those within their Precincts, and to educate the Clergy within their Deanery; when the Ordinary shall appoint, or to give Indultion in the Absence of the *Archdeacon*. They are in some Dioceses sworn to certain Articles; this was anciently used, which shall be subjoyned, that to the whole Duty of a *Dean Rural* may be understood.

(23.) *A B* do swear, diligently and faithfully to execute the Office of *Dean Rural* within the Deanery of *C.* 1. I will diligently and faithfully execute, or cause to be executed, all such Processes as shall be directed unto me from my Lord Bishop of *E.* or his Officers or Ministers, by his Authority. 2. Item, I will give diligent attendance, by my self or my Deputy, at every Consistory

*Articles mini-
fred to Deans
Rural.*

Consistory-Court, to be holden by the said Reverend Father in God, or his Chancelor, as well to return such Proseses as shall be by me or my Deputy executed, as also to receive others, then unto me to be directed.

3. Item, I will from time to time, during my said Office, diligently enquire, and true Information give unto the said Reverend Father in God, or his Chancelor, of all the Names of all such Persons within the said Deanery of C. as shall be openly and publicly noted and defamed, or vehemently suspected of any such Crime or Offence, as is to be punished or reformed by the Authority of the said Court. 4. Item, I will diligently enquire, and true Information give of all such Persons and their Names, as do administer any Dead mens Goods, before they have proved the Will of the Testator, or taken Letters of Administration of the deceased Intestates. 5. Item, I will be obedient to the Right Reverend Father in God, J. Bishop of N. and his Chancelor, in all honest and lawful Commands; neither will I attempt, do, or procure to be done or attempted, any thing that shall be prejudicial to his Jurisdiction, but will preserve and maintain the same to the uttermost of my Power.

(24.) By one of the Constitutions of Otho, the Dean Rural is forbidden to meddle with the Cognizance of Matrimonial Causes; and by another he is commanded to have an Authentical Seal: which shews; that anciently there was somewhat of Jurisdiction intrusted with them; though now there is nothing left but their Name, their Power being no more than what the Bishop plealeth to employ them in.

Dean Ruralis
Power.
Const. Otho.
Cum non solum.
Const. Otho.
Quoniam Tabel-
lionum.

(25.) For the Government of the Church, and Correction of Offences by the aforesaid Officers, Visitations of Parishes and Diocesses were allowed, that so all possible care might be taken to have good Order kept in all places of his Diocess. The Archbishop of Canterbury hath right to Visit once in his time, when he plealeth. The Bishop of every Diocess claimeth his Primary and Triennial Visitations, by himself or his Vicar-General. The Archdeacon is to Visit every Two years, unless he be inhibited by his Superior; and then, when the Superior Visits, the Power of the Inferior is always superseded and cealeth, and the Profits of the Jurisdiction are devolved upon the Officers of the Visitor.

Of Visitations.

As when the *Archbishop* Visits, his *Vicar General* hath the Income during the time of the Inhibition; and when a *Bishop* Visits his Diocese, his *Archdeacons* and the *Peculiars* are Inhibited that year, and all *Probates*, *Administrations*, and other Judicial Acts are done before the *Chancellor* of the Diocese: Which Visitations though once questioned as Illegal, were allowed of under the hands of all the Reverend Judges, as followeth.

Primo Julij, 1637.

May it please Your Lordships,

(26.)
The Judges
Certificate
concerning
Ecclesiastical
Jurisdiction.

According to Your Lordships Order made in His Majesties Court of Star-Chamber, the 12th of May last, we have taken Consideration of the Particulars wherein our Opinions are required by the said Order; and we have all agreed,
That Processess may Issue out of Ecclesiastical Courts in the Name of Bishops; and that a Patent under the Great Seal, is not necessary for the keeping of the said Ecclesiastical Courts, or for the enabling of Citations, Suspensions, Excommunications, or other Censures of the Church: And that it is not necessary, that Summons, Citations, or other Processess Ecclesiastical in the said Courts, or Institutions or Inductions to Benefices, or Correction of Ecclesiastical Offences by Censure in those Courts, be in the Kings Name, or with the style of the King, or under the Kings Seal; or that their Seals of Office have in them the Kings Arms; And that the Statute of Primo Edwardi Sexti, cap. 2. which Enacted the contrary, is not now in force.

We

We are also of Opinion, That the Bishops, Archdeacons, and other Ecclesiastical Persons, may keep their Visitations, as usually they have done, without Commission under the Great Seal of England so to do.

Jo. Bramstone,	George Croke,
Jo. Finch,	Tho. Trevor,
Humfr. Davenport,	George Vernon,
William Jones,	Ro. Berkley,
Jo. Dinham,	Fr. Crawley,
Rich. Hutton,	Ric. Weston.

Inrolled in the Courts of Exchequer, Kings-Bench, Common Pleas; and Registered in the Courts of High-Commission and Star-Chamber.

(27.) Upon this Certificate, penned with so great deliberation and Advice, King CH A R L E S the First set forth a Proclamation the Eighteenth of August, in the Thirteenth year of his Reign, to declare, That the Proceedings of the Ecclesiastical Courts and Ministers, are according to the Laws of the Realm.

(28.) In these Visitations the Churchwardens and Sidesmen, are to give an Account of the State of their Parish by virtue of their Oath, which is now allowed even by the Common Lawyers, and by a particular Consultation with them and the Civilians, the following Oath was penn'd, as allowed to be used in all Dioceses.

You shall Swear, truly and faithfully to execute the Office of a Churchwarden within your Parish, and according to the best of your skill and knowledge present such Things and Persons, as to your knowledge are Presentable by the Laws Ecclesiastical of this Realm. So help you God, and the Contents of this Book.

The Churchwardens Oath.

You

(29.)
The *Sidesmans*
Oath.

You shall Swear, that you will be assidant to the Churchwardens in the execution of their Office, so far as by Law you are bound. So help you God.

Can. 116.

So that all probable care is taken for the maintenance of good Manners and Religion; and if the several Officers are defective in their charges, the Ordinary is no ways to be blamed. The Churchwardens are bound to present by the Canon at least twice every year, *Easter* and *Michelmas*; and in some Diocesses, as *Peterborough*, *Oxford*, *Glocester*, &c. (according to the Old Canons) they keep a Vernal and Autumnal Visitation at *Michelmas*, for the second Bills of Presentment: And in case of neglect or carelessness in these Officers, the Minister may present according to the Law, that what is amiss may be reformed.

Can. 113.
Can. 85.
Churchwardens
to make Rates.

(30.) Above all, *Churchwardens* and *Questmen* are to maintain the Church in sufficient Repair, which is to be done by a Tax made by the *Churchwardens* and *Parishioners* after publick Notice given of the Time and Place where they meet, and those that refuse are to be sued in the *Spiritual Court* only. And for the better direction of Persons concerned, here followeth the particular Consultation of the Learned *Civilians* about *Church-Rates*.

(31.)
Instructions of
the *Civilians*
for making
Rates.

An Order and Direction set down by Doctor King, Doctor Lewen, Doctor Lynsey, Doctor Hoane, Doctor Sweite, Doctor Steward and Others, Doctors of the Civil Laws, to the Number of Thirteen in all, assembled together in the Common Dining-Hall of Doctors Commons in London, touching a Course to be observed by the Assessors to their Taxations of the Church and Walls of the Church-yard of Wrotham in Kent; and to be applied generally, upon occasions of like Reparations, to all Places in England whatsoever.

1. Every Inhabitant dwelling within the Parish is to be charged according to his ability, whether in Land or Living within the same Parish, or for his Goods there; that is to say, for the best of them, but not for both.

2. Every

2. Every Farmer dwelling out of the Parish, and having Lands and Living within the said Parish in his own Occupation, is to be charged to the value of the same Lands or Living; or else to the value of the Stock thereupon, even for the best, but not for both.
 3. Every Farmer dwelling out of the Parish, and having Lands and Living within the Parish in the Occupation of any Farmer or Farmers, is not to be charged; but the Farmer or Farmers thereof are to be charged in particularity, every one according to the value of the Land which he occupieth; or according to the Stock thereupon, even for the best, but not for both.
 4. Every Inhabitant and Farmer occupying Arable Land within the Parish, and feeding his Cattel out of the Parish, is to be charged with the Arable Lands within the Parish, although his Cattel be fed out of the Parish.
 5. Every Farmer of any Mill within the Parish, is to be charged for that Mill; and the Owner thereof (if he be an Inhabitant) is to be charged for his hability in the same Parish, besides the Mill.
 6. Every Owner of Lands, Tenements, Copyholds, and other Hereditaments, Inhabiting within the Parish, is to be Taxed according to his Wealth in regard of a Parishioner, although he occupy none of them himself; and his Farmer or Farmers also are to be Taxed for occupying only.
- Memorandum*, That the Assessors are not to Tax themselves, but to leave the Taxation of them to the residue of the Parish.

The Reparations of these Parcels ensuing, with their Appurtenances, are to be accounted Church-Reparations; and are to be born, not only by the Parishioners, but also by all that occupy any Lands, Tenements, or Possessions within the Parish where the Church is to be repaired.

1. The Walls of the Church, Steeple, and Church-yard of Freestone, or Brick.
2. The Roof of Timber, with Latches, Pegs, Nails, Dogs, and Bolts of Iron.
3. The Windows of Stone or Brick.
4. The Covering with Lead, Latches, Tyles or Shingles.
5. The Floor of Stone, or Paving-Tyle.
6. The Doors of Timber, with Locks, Keys, Riders, Hooks, Nails.

7. The Furniture of the Steeple, Stairs, Floors, Bells, Wheels, Ropes.
8. The Pulpit, &c.
9. The Pews or Seats, not made by any Private Person.

These following are not properly Church-Reparations; but they are the Duties belonging to the Church, to be performed ratable by any Inhabitant of the Parish.

1. The Communion-Table, with the Covering thereof.
2. The Communion-Cup.
3. The Bread and Wine for the Communicants.
4. The Books.
5. The Surplices.
6. The Washing of the Communion-Clothes.
7. The Candles.
8. The Clerks and Sextons Wages.
9. The Expences and Fees of the Churchwardens and Side-men at the Visitation.

Terriers.

Can. 87:

(32.) The Churchwardens, who are Guardians of the Church, are also to take care that true *Terriers* be made of the Glebe-Lands, Meadows, Gardens, Orchards, Houses, Stocks, Implements, Tenements, Customs of Tithing, and Portions of Tithes lying out of their Parishes, which belong to their Incumbent; which being signed by them and their Minister, ought to be laid up in the Bishops Registry for the good of Posterity, and it may be convenient to have a Copy of the same exemplified in the Church-Chest.

Augmentations.

29 Car. 2.

(33.) By a late Act of Parliament concerning Augmentation of small Vicarages and Curacies, it is enacted, *That all and every Augmentation of what nature soever, granted, reserved, or agreed to be made payable, or intended to be granted, reserved, or made payable since the first of June in the Twelfth year of his Majesties Reign, &c. shall for ever hereafter continue and remain.* Which Grants are to be fairly entred in Books of Parchment, to be kept by the Register of the Bishop of the Diocels. *See the Act at large.*

(34.) Although by the Law the whole Diocesis is subject to the care of the Bishop, yet some places by an especial Privilege, Grant, or Composition, claim a kind of Jurisdiction in themselves, and these are called *Peculiars*. Their Power is limited to some certain Parishes and places, at first exempted by the Pope for his Advantage only; Their Jurisdiction is various, more or less according as it was first indulged, it is generally *Accumulative cum Episcopo*, or *Privative*.

Of Peculiars.

Asta. Tamavin. de Jure Abbatum, disp. 19. q. 1.

(35.) If their Power is acquired only *Accumulative cum Episcopo*, then they have only *Archidiaconal Jurisdiction* at most, and the Bishop hath a *Concurrence* with them. And the Power of Probate of Wills and granting Administrations, is as well fixed in the *Ordinary of the Diocesis* as in the *Official of the Peculiar*, it being at the election of the Parties to go to which they please; only in the *Metropolitcal Visitation*, or the *Primacy and Triennial* of the Bishop, these Inferior Courts are inhibited, and their Power ceaseth. When the Parties deceased have not *Bona Notabilia* out of the *Precincts* of the *Peculiar*, then the Administration is good, if committed by the *Official of the Peculiar* or *Chancellor*, or *Commissary* of the Diocesis, which of them shall first Cite. But if there be *Bona Notabilia* out of the *Peculiar*, but not out of the *Diocesis*, then the Cause doth solely belong to the Superior Court of the Bishop, and not to the Judge of the *Peculiar*. This Power of Exempt places is stated at large by the Canonists.

Peculiars of Archidiaconal Power.

Jo. And. Hostiensis, Immol. & alij, in c. Pastoralis de Officio ordinarij.

(36.) If their Jurisdiction be acquired *Privative* excluding the Bishop, it ought to be expressed in the Grant or Composition; for *Visitandi Jus alicui concessum non censetur concessum Privative quoad Episcopum, nisi expresse dictum sit quod Episcopus non possit Visitare*. So that the Judges of some *Peculiars* that have Episcopal Power are totally exempt from the ordinary Visitation of the Bishop, and only subject to the *Metropolitan*: For the Archbishop of Canterbury hath divers Parishes within the City of London and other Dioceses, for the Government of which he hath his Court of *Peculiars*. Those places only that have Episcopal Jurisdiction can grant Licenses for Marriages, for so it is enacted by the Canons, that Licenses shall be granted only by such as have Episcopal Authority, and that exercise of Right Episcopal Jurisdiction. And where any *Peculiars* that are only exempt from the Archdeacons Visitation pretend to such a Power, it is an apparent wrong and incroachment upon the Rights of the *Chancellor* of the Diocesis, to whom that Power is only granted. "These things following, saith *Panormitan*, do properly belong to the Consistory of the Bishop. *Cognitio Causarum Matrimonialium sicut & Publicæ Penitentiae Impositio, ac Indulgentiarum concessio sunt proprie Dignitatis Episcopalis*.

Peculiars that have Episcopal Power.

Co. Inst. part 4.

Can. 101. & Constit. Eccl. A. D. 1597.

Panor. in cap. Accidentibus de Excess. Prælatorum, num. 2, 3.

H h h h h

(37.)

*The abuse of
Peculiars.*

*Extf de Pri-
villegijs, & co-
dem tit. in 6.*

*Can. 126.
Of the wills of
Peculiars.*

*Of Sequestra-
tions.*

*Const. Othobon.
c. Ecclesiarum.
28 H. 8. c. 11.*

*Sequestration
pendente Lite.
D. 16. tit. 3.
l. 5. & 17.
Lind. l. 2. tit. 4.
c. frequens.*

*Sequestration
for Dilapidati-
ons.
Const. Othobon.
c. Improbans.*

(37.) And 'tis the great interest of the Ordinary to have a watchful eye over the Courts and Proceedings of these *Peculiars*, for they often abuse their liberty to excess, and claim a larger Power than belongs to them either by Law or Composition, which being at first unobserved or passed over by a too kind Connivance, they at last claim a total exemption, and their Usurpation passeth into Right, whereas there was no such large Priviledge intended in their Original Grant. And these unjust Practices are provided against (as being feared) in several Titles of the *Canon Law*. And it would be happy if they were all thrown up and only subjected to the Jurisdiction of the *Diocesan*.

(38.) By the Canons it is decreed, that all these *Peculiar Courts* shall once in every year exhibit into the Publick Registry of the *Bishop of the Diocess*, or of the *Dean and Chapter*, under whose Jurisdiction the said *Peculiars* are, every Original Testament by them proved, or at least a true Copy examin'd and subscribed, and Sealed by the Peculiar Judge and his Notary, upon pain of *Suspension* until it be performed.

(39.) When a Living becomes void by the death of the Incumbent, or otherwise; the *Ordinary* is bound to send out his *Sequestration*, to have the true Cure supplied, and to preserve the Profits for the use of the Successor. Heretofore the *Bishop* laid claim to the Profits of every Living during the Vacancy, and then they oftentimes delayed to give Institution, and protracted the time that they might have the longer Vacancy. But this was forbid by one of the *Legatine* Constitutions, and afterwards confirmed by an *Act of Parliament*, which saith in the Title, *Fruits taken during the Vacancy of a Benefice, shall be restored to the next Incumbent, whose charge for the First-Fruits shall begin from the first Vacation*. So that now, deducting for the Service of the Cure, which ought to be moderate and appointed by the *Ordinary*, and paying the charges of the *Sequestrators*, the overplus belongeth to the new Incumbent.

(40.) Sometimes the Fruits and Profits of a Living which is in controversy, either by the consent of Parties, or the Judges Authority, are *sequestered* and placed for safety in a third hand. And thus when two different Titles are set on foot, the Rights are carefully preserved and given to the Conqueror that overcomes by Law.

(41.) Sometimes when the Houses and Chancels that the Incumbent is bound to Repair, are ruined and ready to fall, if after due *Admonition* they shall delay to begin to amend the same within two Months, then the *Bishop* of the Diocess, that time being elapsed, shall *sequester* the Fruits and Tithes till those defects are amended;

amended; and though the Admonition proceed from the *Arch-deacon*, yet it appears by the Text, that the *Bishop* only hath the Power of *Sequestration*.

(42.) Sometimes for neglect of *serviſing the Cure*, or upon the *Kings Writ* to the *Bishop* to ſatisſie the Debts of the Incumbent, the Profits of the Living are to be *Sequeſtered*: In all which caſes the *Sequeſtration* ought to be publiſhed, that the Perſons concerned may know how to pay their Tithes; and the fitteſt place for the performance thereof is the *Pariſh-Church*. And then, thoſe that hinder the execution thereof incur the Penalty of the Law, which is this, *Violatores Sequeſtrorum in Caſibus a Jure permiſſis interpoſitorum, poſt Publicationem debitæ loco & tempore factam, majoris Excommunicationis ſententiam incurrunt*. Of all which *Sequeſtrations*, thoſe which are intruſted are uſually bound by Bond and Oath to render a true and juſt account; which done, the Decree of *Relaxation* paſſeth under the *Chancellors Seal*.

Sequeſtration to ſerve the Cure, or for Debts.

Lind. lib. 2. c. 4. c. Frequens, ver. poſt publicationem.

(43.) To defend the *Eccleſiaſtical Power*, and to controul obſtinate Sinners and contumacious Offenders, the *Cenſures* of the Church were introduced, which are inflicted according as the Offence is greater or leſſer; ſometimes by the Law it ſelf, ſometimes by the Sentence of the Judge. Theſe are reckoned by *Lindwood* to be of three ſorts, *Suſpenſio, Excommunication, & Interdictum*.

Of the Church Cenſures.

Exiſt. l. 1. c. 37. c. ad Reprimendam.

Lind. de Conſuetud. c. Statutum, ver. Cenſura.

Of Suſpenſion. Navar. g. 29. nu. 157.

Can. 122.

(44.) *Suſpenſion* is the proper Punishment of an offending Clergy-Man, *Suſpenſio eſt Cenſura quædam Eccleſiaſtica, qua perſona Eccleſiaſtica impeditur ne exerceat functiones ſui Beneficij vel Ordinis*. It is either *ab Officio vel Beneficio*; the firſt is the puniſhment for Contumacy in not appearing upon lawful Summons, the ſecond for higher Crimes.

(45.) This Cenſure is inflicted *ab Homine vel Jure*, by the Decree of the Judge or the Law, and then for a greater or ſmaller Crime; if for a ſmaller fault, then it is only *ab Officio*; but if a Clerk that is ſuſpended *ab Officio*, ſhall condemn the ſame by ſerviſing his Cure, notwithstanding his *Suſpenſion*, then a ſeverer Cenſure follows, *Pro ſuſpenſo publice denuntiatus, ſi interim Immiſceat ſe divinis, ſecundum ſententiam Doctorum efficitur Irregularis*. Or if a Clerk that is ſuſpended *ab Officio*, ſhall continue ſo without ſubmiſſion or ſeeking to be reſtored, then he may be ſuſpended *a Beneficio* alſo, *ſubtrahi debet Beneficium, quando ſic ſuſpenſus eſt in mora petendi Abſolutionem*. By the Canons of *King James* if his Contumacy continues, he is to be Excommunicated, and after forty days he is deprivable for Incorrigibility.

Suſpenſ. ab Officio & Beneficio, Lind. de Conſuetud. c. quia Incontinent. ver. Suſpenſiones.

Lind. ibid.

Can. 122.

(46.) For ſeveral Offences the Law doth ſuſpend a Clergy-Man: as after due Notice for reſuſing to Chriſten or Bury, he is to be ſuſpended by the *Bishop* of the Dioceſs from his Miniſtry by the

cauſes of Suſpenſion. an. 68.

Extr. 4. t. 3. c. 3.
Lind. de Clan.
de sp. c. quia
Ex. &c. Huma-
na.
Can. 38.
Navar. c. 27.
D. 159.

Form of Suspend-
sion.

Extr. l. 5. t. 39.
c. Ventrabilis.

Bona. de Cen-
suris, dis. 3.
nu. 12.

Susp. ab Ingres-
su Ecclesiæ.
5 & 6 E. 6. c. 4.

Of Excommuni-
cation.

Excommuni-
cacio ipso
facto.
5 & 6 E. 6. c. 4.

Lind. de Clau-
desponsatio-
ne, c. Humana.
Host. de Sen.
Excom. §. quis
possi.

Excommuni-
cacio Major.
C. 11. q. 3.
c. 106.

space of three Months. As for Marrying without Banns or Licence, or at unreasonable Hours, or prohibited Times, he is to be suspended *per Triennium*. They also that omit to read the Common Prayers, as by Law prescribed, incur the pain of *Suspension*. And so in divers other cases; as for Marrying in a Parish Church that is not expressed in the *Licence*, the Minister may be *suspended* a whole year.

(47.) The *Form of Suspension* is no where described or set down in the *Canon Law*; but only that it be expressed in writing: Neither is there any determinate form for the *Absolution* from that Censure. Some will have an Oath *de parendo furi & stando Mandatis Ecclesiæ*; and then it is affirmed, that these followings words are used by the Judge, *Ego N. te absolvo a Vinculo suspensionis in quam Incurristi, & restituo te ad Executionem tui Muneris vel Ordinis, vel ad Beneficium*. In all which cases it is requisite, that the offending Party do give satisfaction according to the quality of his Fault, before he be dismissed.

(48.) There is also a *Suspension ab Ingressu Ecclesiæ* from entering into the Church, or receiving of the Sacraments, which is inflicted upon Lay-persons for smaller Crimes and Contempts; but now generally laid aside and disused. This was a kind of *minor Excommunication*.

(49.) The next Censure of the Church is *Excommunication*, which is inflicted either *ab Homine vel fure*: when 'tis inflicted *ab Homine* 'tis usually for *Contumacy*, in not appearing before the Ecclesiastical Judge after a legal Summons, or else for disobeying the Orders, Decrees, and Sentences of the Court, and the slighting of his Authority.

(50.) When this Sentence is inflicted *a fure*, 'tis for some great and notorious Crime, as he that shall strike in the Church or Church-yard is by the Statute of *Edw. 6.* Excommunicated *ipso facto*; as also those that are married without Banns or Licence, that are present at, or consenting, privy to, or assisting at a *Clandestine Marriage*, are Excommunicated *ipso facto*. There are reckoned by *Hostiensis* above thirty Cases wherein the Law imposeth Excommunication; as for *Heresie*, for *striking a Clergy-man*, or *Involving the Rights of the Church, &c.* And *Lindwood* in his last Gloss saith, there are One hundred seventy five Cases of this nature.

(51.) The *Major Excommunication*, which is for great and scandalous Sins, is solemnly denounced by the *Bishop* himself with great terror; he is to be accompanied with twelve Priests that have burning Tapers in their hands, who when the dreadful Sentence is denounced, extinguish their Lights and tread them under their feet. Now although the *Fanatick* and *Nonconforming* Party do wilfully seclude

seclude themselves from the Congregation of *Christ's Church*, yet this Sentence was ever dreaded by our Ancestors, that were men of Parts and Piety; it being a kind of binding and delivering over to *Satan*. At this day the Sentence of *Excommunication* is so much feared and dreaded in the *Greek Church*, that the most impudent and obdurate Sinners do startle at it. And they tell Examples of such sad effects as have issued thereupon, that it is one of the most powerful Arguments to enforce Obedience, and keep them within the bounds of their Duty. When any is *Excommunicated* there, his company is hated and detested, 'tis universally thun'd and avoided as scandalous; and they have an Opinion, that the Body of an *Excommunicated* person cannot return to Dust and Ashes till the Censure be released. Of which there is a strange Relation in *Mart. Crusius Hist. Polit. Turcograciæ*: And another parallel story to this related by Mr. *Ricaut* in his *State of the Greek Church*.

Mart. Crusius,
lib. 1. pag. 27.

Ricaut p. 279.

(52.) He that desires to be Absolved and released from the Sentence of *Excommunication*, must by himself or his Proctor make a submission to the Judge of the Court, especially if he is imprison'd by the Writ *de Excommunicato Capiendo*, he must put in Caution *de Parendo Furi & stando Mandatis Ecclesiæ*. For it is highly reasonable, that he who hath resisted the Course of Law, and contumaciously persisted in *Excommunication* until his Imprisonment, should first give good Security before he be trusted again, and discharged from his just Confinement.

Of Absolution.

Dr. cor. Apology, chap. 2.

(53.) These *Cautions* are of three sorts; 1. *Fidejussoria*, when a man is bound with Sureties to perform such things. 2. *Pignoratitia*, when a man gives a Pledge for the performance of what is desired. 3. *Juratoria*, when the Party swears. One of these Methods is observed in *Absolutions*, and the usual way is an Oath from the Criminal *de Parendo Furi & stando mandatis Ecclesiæ in forma Juris*. But certainly the best way for satisfaction is for the Ordinary to require a sum of Money for Caution before he decrees *Absolution*; this being the best Security, for those that value not the Laws of the Church or an Oath, will yet regard their Money. And therefore where the *Quakers* will not swear to receive *Absolution*, they may compel the Ordinary to accept of a sum of Money for Caution, and the Writ *de Cautione admittenda* mentioned in the Register, was provided as a remedy in that case. This Caution must be offered by the Offending Party, or his lawful Proctor; for he is to satisfy *de contemptu & injuria Ecclesiæ illata antequam a Præsona deliberetur*. It must be also *Idonea & sufficiens Cautio*, which is not determined by the Law, but left to the discretion of the Judge who is to consider the abilities of the Person, and the qualities of the Offence. This power of receiving the Submission of *Excommunicated*

Of cautions.

Dr. cor. Apology, pag. 13.

Fitz. Nat. Er.

5 Eliz. 23.

Of Interdicts.

Instit. 4. c. 15.

Nov. c. 27. nu.

166.

Tamb. 2. tom.

dis. 15. qu. 1.

Of the contempt

of an Interdict.

Tamb. ibid. q. 6.

Lant. Instit. lib. 4.

tit. 14. c. Ex-

cepti.

C. 18. de Sent.

Excoffi in 6.

c. Excep. i.

An. D. 1606.

See the Quarrel

of Paul the 5th

with the State

of Venice.

Of Penance.

Extf lib. 5. r. 38

cated Persons that are signified and Imprisoned, is allowed by Act of Parliament, which at large shews the manner of proceeding against such obstinate Persons.

(54.) The third Censure of the Church is an *Interdict*. *Interdicere* significat *prohibere* & *vetare*, this is a forbidding of the Celebration of Divine Offices of a certain people; and then it followeth the Persons wheresoever they remove, which is called *Interdictum personale*. The second is *Interdictum locale*, which is directly levell'd against such a place; and then the Inhabitants may be received into another Church, but not their own. The third, which is *Interdictum mixtum*, is when both Place and People are subjected to this Censure.

(55.) Those that violate the *Interdict* and celebrate Divine Service, are to be punished with Excommunication. During these times Baptism is allowed both to Children and those of riper years, because of the frailty and uncertainty of life. The holy *Eucharist* is not allowed, except it be in the Article of Death; and so also is Christian Burial denied in any Consecrated place, except it be done without Divine Offices. This is sometimes imposed by the Superior for great Contempt after monition; sometimes by the Canon, as a Church is Interdicted for Murther, &c. committed in it. This Censure is now almost totally laid aside; only the remembrance of that great Interdict which Paul 5. laid upon the *Venetians* and engaged all Christendom in the quarrel, is still fresh in mens minds, it continuing about three years. And when the oppressed *Venetians* began to take Arms, the matter received a speedy accommodation.

(56.) Besides these greater Censures, Ecclesiastical Penance is used in the Discipline of the Church, which doth affect the Body of the Penitent, by which he is obliged to give a publick satisfaction to the Church for the scandal he hath given by evil Example. So in Primitive times they were to give Testimonies of their Reformation, before they were readmitted to partake of the Mysteries of the Church. In the case of Incest or Incontinency the Sinner is usually enjoined to do a publick Penance in the Cathedral or some publick Market, bare-legged and bare-headed in a white Sheet, and to make an open Confession of his Crime in a prescribed form of Words, which is augmented or increased according to the quality of the Fault, and the discretion of the Judge. So in smaller Faults and Scandals a publick satisfaction or Penance, as the Chancellor of the Dioceses or other competent Judge shall decree, is to be made before the Minister, Churchwardens, or some of the Parishioners, respect being had to the quality of the offence, and circumstances of the Fault; as in the cases of Defamation, Cl^{erical} Marriage, striking and abusing of a Minister, or the like. For those Faults which are undeter-

min'd, in *Judicis potissimum reponitur arbitrio, qui ex qualitatibus varijs majorem vel minorem penam statuet.*

(57.) Yet these Censures may not only be moderated, but also totally altered by a *Commutation of Penance*; and this hath been the ancient Privilege of the Ecclesiastical Judge, to admit that an oblation of a sum of Money to be distributed in *Pious Usus*, to publick Highways, the Relief of the Poor, and such like Charitable Work, be accepted in satisfaction of Publick Penance. This is expressed in *Articul. Cleri.* Now this Power is solely fixed in the Bishops Court, not in the Archdeacons, or any other inferior Judge whatsoever, as is proved by the Legatine Constitutions.

Lanc. Instit.
lib. 4. t. 8. c.
Demum si.
Of Commutati-
on.
Lind. li. 2. t. 28.
c. Accidit.
9 E. 2. c. 2, & 3.
Const. Othobon.
tit. 19. c. Deus,
in fine—

(58.) Physicians and Chyrurgions in the time of King Hen. 8. were to be allowed for the City of London, and seven miles round, by the Bishop of London and Dean of St. Pauls, they calling to their assistance for Examination four Doctors of Physick, and for Chyrurgery other expert Persons; and those that Practice may also be Licensed by the Universities by a particular Privilege which is granted to them. In other Diocesses, all Physicians and Chyrurgions are to be examin'd and admitted by the Bishop of the Diocess, or his Vicar General. And those that shall presume to Practice without the Licence of the Ordinary, shall forfeit the sum of five pounds a Month; which Act doth particularly defend and preserve the Privileges of the two Universities.

Of Physicians
and Chyrurgi-
ons.
3 Hen. 8. c. 11.

(59.) Every Clerk that passeth out of one Diocess into another, ought to have the *Letters Dimissory* or *Commendatory* of his Diocessan, to testify of the Sobriety of his Life and Conversation, lest he having lived disorderly in one Diocess, should only fly into another for Refuge and Protection. And neither Institution nor Orders are regularly to be granted without these.

Letters Dimis-
sory.
Lind. li. 1. t. 5.
c. cum quanta,
ver. loci Dio-
cese.

(60.) The four Solemn Times for conferring of Orders are the *Ember-weeks*, (they were originally called *Ember-days*, because then they only eat Cakes baked under Ashes, that so they might be minded that they were only Ashes, and so should turn again) and it is not lawful for any Bishop to Ordain out of those Set-times, without a Faculty from the Metropolitan. And the Persons to be Ordained must have these qualities, *A Title to a Cure, Fellow of a Colledge, Master of Arts of five years standing, that live at his own Charge.* And in case these qualifications be absent, the Bishop that Ordains him is to provide for him till he prefer him to some living. And by an Act of Queen Eliz. for the Reformation of Disorders in the Ministers of the Church, the Person to be Ordained must bring a Testimonial to the Bishop of his honest life; be able to give an account of his Faith in Latin, and also first subscribe the Thirty nine Articles. For which Letters of Orders, there is to be paid but Ten shillings at most.

The Times of
Ordination.
Extf li. 1. t. 11.
Canon 34.
Can. 33.
13 Eliz. c. 12.
Can. 125.

The

MUSEUM
BY APPOINTMENT
TO HIS MAJESTY

The Summary of the Appendix.

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53. Of *Cautions*.
54. Of *Interdicts*.
55. Of the Contempt of an *Interdict*.
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